Supreme Court, U.S.
FILED

No. 981052 DEC 2 2 1998

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Supreme Court of the United States

October Term, 1998

LARRY B. AND SHIRLEE ALEXANDER, et al. and
WILLIAM AND CHARMOND ADKINS, et al.
Petitioners,

v.

UNITED STATES OF AMERICA, et al.
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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aBCD Legal Printers, Seattle, Washington

37 pp

QUESTIONS PRESENTED

In 1855, the respondent Indian tribes entered into five treaties with the United States, agreeing to cede their aboriginal lands in western Washington Territory for settlement. The treaties secured to the Tribes the "right of taking fish at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." The Tribes' right to take shellfish was limited by a specific proviso: "provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens." Since joining the Union in 1889, the State of Washington, with the consent of the United States and without objection from the Tribes, has sold approximately half of its tidelands. These private tidelands are now owned by thousands of individuals, most of whom also own and occupy the adjoining upland property.

1. Does the treaty "right to take fish . . . in common with all citizens" grant to western Washington Indian tribes the right to enter on and harvest shellfish from thousands of parcels of privately owned tidelands that were conveyed in fee by the State of Washington?

2. By posting their property to exclude others do private owners "stake" tidelands within the meaning of the treaty proviso prohibiting Indian tribes from taking "shell-fish from any beds staked or cultivated by citizens"?

PARTIES TO THE PROCEEDINGS

Petitioners, intervenor-defendants and appellants below, consist of two separate groups of private property owners in the State of Washington:

a. Larry B. and Shirlee Alexander, Harold E. and Billie B. Bauer, James and Ann Carter, William J. and Jeanette Chase, Mrs. Frances A. Fellows, George L. Grader, Earl D. and Millicent Ann Hunsperger, Edward B. and Eleanor J. Krenz, H.J. Merrick, Gordon W. Moss, Sewall L and Emma M. Reynolds, John D. Riach, Alva Hazel B. Robb, Irene D. Smith and Providence Worley.

b. William and Charmond Adkins, Grace Boyd, Pierce W. and May H. Davis, Ms. Rosemary Duncan, James E. Hadley, James C. and Sarah H. Johnston, William and Jo Ann Kirsh, David A. Mitchell, Mr. Louis Nawrot, Robert and Sandra Stevenson, and Boon Ho Woo.

Petitioners are collectively referred to as "Private Owners."

Respondents, defendants-appellants below, are the State of Washington, the Puget Sound Shellfish Growers Association ("Growers"), consisting of:

Taylor United, Inc.; Olympia Oyster Company; J&G Gunstone Claims, Inc.; G.R. Clam & Oyster Farm; Cedric E. Lindsay; Minterbrook Oyster Company; Charles and Willa Murray; Skookum Bay Oyster Company, and

26 Tideland and Upland Owners (UPOW):

Dan Buehler, Robert L. Davis, Bruce I. Fielding, Arthur J. Gerdes, Joe Hotts, Keith C. Heutson, Commander John C. James, Richard Sayre Koch, Elaine C. Lefler, Joan Lemonds-Roush, John S.

Lewis, Steven L. Luke, Edwards R. McMillan, Robert F. Newman, Mark A. Hysether, Arthur I. Price, Ray D. Randall, Cynthia Rasmussen, Robert G. Shanks, Axel Strakejahn, Leana Tracy, Stuart W. Turner, George B. Usnick, Lee S. Vincent, Joan Walker, and William E. Whitney, Jr.

Respondents, plaintiffs and appellees/cross-appellants below, are the United States of America and the following Indian tribes in western Washington State ("Tribes"):

Muckleshoot Tribe, Noosack Tribe, Upper Skagit Tribe, Szuaxin Island Tribe, Lummi Indian Tribe, Makah Tribe, Tualip Tribe, Swinomish Indian Tribal Community, Quileute Indian Tribe, Puyallup Tribe, Hoh Indian Tribe, Suquamish Tribe, Suquamish Tribe, Quinault Indian Nation, Confederated Tribes & Bands of the Yakima Indian Nation, Nisqually Indian Tribe, Jamestown Tribe, Lower Elwha Klallam Tribe, Port Gamble Bands, Skokomish Tribe, Sauk-Suiattle Tribe, Stillaguamish Tribe.

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PETITION FOR WRIT OF CERTIORARI

The petitioners, private owners of tidelands and adjacent upland property, ask this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit described below.

OPINIONS AND JUDGMENTS BELOW

The Ninth Circuit's opinion was initially filed on January 28, 1998. The Ninth Circuit amended its opinion and denied rehearing en banc on September 25, 1998. App. 1, reported at 157 F.3d 630. That opinion affirmed the decision of the district court for the Western District of Washington reported at 873 F. Supp. 1422, App. 51, and affirmed in part and reversed in part the district court's decision reported at 898 F. Supp. 1453 and 909 F. Supp. 787, App. 95, 135.[1]

JURISDICTION

The Court of Appeals entered its final judgment on September 25, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATY PROVISIONS INVOLVED

Treaty of Medicine Creek, 10 Stat. 1132 (1855), App. 169; Treaty of Point Elliott, 12 Stat. 927 (1859), App. 177; Treaty of Point No Point, 12 Stat. 933 (1859), App. 187; Treaty of Neah Bay, 12 Stat. 939 (1859), App. 195 and the Treaty of Olympia, 12 Stat. 971 (1859), App. 203.

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[1]Appendix citations are to the joint appendix filed by the State of Washington in this case and the companion cases of ***Washington v. United States***, No. 98-_____, ***Puget Sound Shellfish Growers v. United States***, No. 98-_____ and ***26 Tideland and Upland Private Property Owners ("UPOW") v. United States***, No. 98-_____.

STATEMENT OF THE CASE.

This dispute arises from the Tribes' asserted right to enter upon and take shellfish from tidelands conveyed to private individuals in fee by the State of Washington. Under five treaties negotiated with the United States in 1855, the respondent Tribes ceded their aboriginal lands in western Washington Territory for settlement. The treaties secured to the Tribes the "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory. . . ." That right to take shellfish, however, was limited by this proviso: "Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens." The courts below held that the right to take fish "in common with" all citizens allows Indians to harvest shellfish on private tidelands from which the general public is excluded and that this right is not limited by the treaty language prohibiting Indians from harvesting shellfish from "any beds staked or cultivated by citizens."

Today, 53 percent of the tidelands in the treaty area are privately owned. The remainder are owned by the State, the United States, and the Tribes. Ex. US-181.

A. The Puget Sound Treaties Were Negotiated By The United States To Foster Development Of Cities, Tidelands And Farms, And To Forever Settle All Indian Claims To The Territory.

The treaties at issue were negotiated in late 1854 and 1855 by a treaty commission led by Washington territorial governor Isaac Stevens. Stevens was eager to conclude treaties with the Puget Sound Indians because he believed, as did the

Indians, that the region would soon be overwhelmed by a tide of settlers. App. 68, 70; Ex. D-046; *see* ***Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n***, 443 U.S. 658, 661 (1979) (treaties executed "[t]o extinguish the last group of conflicting claims to land lying west of the Cascade Mountains and north of the Columbia River. . .").

At treaty time, virtually all the commercial life of the Puget Sound settlements was carried out on the tidelands. The inland terrain was steep and forested and settlement was clustered along the shoreline of Puget Sound, in sheltered bays and inlets. Transcript 239. The bays where settlements grew were, coincidentally, the places where shellfish naturally thrived. Transcript 239; Ex. D-036 at 74. Aided by the federal government, developments of mills, homes and shipyards took over large areas of these tidelands, prohibiting the harvesting of shellfish beds. App. 71-72.

In the 1850's, as now, states had the undisputed right to convey complete ownership in their tidelands and to shellfish beds located in tidelands. Transcript 305-307; *see* ***Shively v. Bowlby***, 152 U.S. 1, 26 (1894); ***Pollard's Lessee v. Hagan***, 44 U.S. (3 How.) 212 (1845). States regularly conveyed tidelands, particularly in urban areas such as San Francisco Bay, where California granted the shoreland bed to San Francisco to plat and sell as part of that city. Ex. D-041; D-467 at 57, discussed in ***United States v. Mission Rock Co.***, 189 U.S. 391, 406-07 (1903). In 1854, Stevens similarly encouraged Washington settlers to take up claims along the tidelands before planned donation land surveys, in order to better secure their ability to

obtain title from the future state. Ex. D-467 at 95; Transcript 519.

B. The Treaty Negotiations Reflect The Tribes' Understanding That Private Property Differed From Unclaimed Or Common Lands, And That The Settlers Marked Their Property With Stakes To Exclude Others.

The Tribes had well-developed concepts of property ownership even before the arrival of settlers. Transcript 454. In an earlier case interpreting these treaties, the district court recognized that the Tribes distinguished between the ownership of land and the sedentary resources it contained, such as shellfish, and migratory resources such as fin fish or animals:

> The record establishes that the Indians recognized exclusive property interests in land and in sedentary resources. However, the Indians viewed migratory fish and animals differently from stationary ones. The right to take fish existed when, and only when, the fish were within or passing through a tribe's particular territory. . . .
>
> . . .
>
> . . . Indians considered shellfish as sedentary creatures to be the property of the tribe within whose territory they were located.

United States v. Washington, 506 F. Supp. 187, 199-200 (W.D. Wash. 1980), *aff'd in part, rev'd in part,* 694 F.2d 1374 (9th Cir. 1982), *on reh'g*, 759 F.2d 1353 (9th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985).

The Indians also understood the settlers' notion of private property as the right to exclude others from land and the resources on it, even from areas that the Tribes traditionally had used for hunting, gathering or shellfishing. Ex. D-064 at 345-

46, 358, 443; Ex. D-473 at 50-51. One of the largest sawmills in the territory, established in 1854, excluded Indians from a traditional shellfish gathering site. Transcript 438.

The treaty Tribes thus understood that their ancestral lands were being taken over by settlers. In the treaty negotiations they sought to secure a permanent and exclusive home and a steady livelihood. Treaty discussions reflected the Indians' understanding that private property, including their own reservations, would be surveyed and marked by stakes, and that a deed or paper would be proof of ownership against third parties. Transcript 272, 453-54; Ex. D-064 at 364, 440-41. Tu-heh-uk, the Chehalis chief, told Governor Stevens, "I want a paper showing the bounds of the reserve. So that when a white man took it, I could show him. I want a place where whites could not settle." Ex. D-064 at 358.

C. The Treaties Were Interpreted In The Years Following Their Ratification To Allow Indians Continued Access To Traditional Salmon Fishing Grounds And To Limit To Unclaimed Tidelands Their Right To Gather Shellfish.

The five treaties negotiated by Stevens and the respondent Tribes provided for the survey and establishment of tribal reservations "for their exclusive use," allowing tribal members to live on "any land not in the actual claim and occupation of citizens" for only one year following ratification. *See, e.g.*, App. 196 (Treaty of Neah Bay). The Tribes received annuity payments for their ceded lands, as well as free schooling, medical care and training in trades. *See, e.g.*, App. 179-82 (Treaty of Point Elliott). Each treaty expressly allowed both the settlers and the Indians to own private property. The Indians

also had the right to fish in common with citizens, and to hunt and gather on open and unclaimed lands:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

See, e.g., App. 170 (Treaty of Medicine Creek).

Spurred by major federal harbor developments and support for completion of a transcontinental railroad, after treaty ratification the cities of Seattle, Tacoma, Bellingham and Port Townsend grew on tidelands containing shellfish beds which had been used by local tribes. Ex. D-470 at 19-28. In 1864, the territorial Legislature granted to commercial shellfish growers exclusive rights in natural oyster beds in southern Puget Sound. App. 63 n.11, Transcript 1936-37. By 1879, legislation gave citizens the right to claim up to ten acres of any newly discovered oyster beds. Session Laws of the Territory of Washington 118-20 (1879).

On November 1, 1889, Washington entered the Union "on an equal footing with the original States." App. 149. In its constitution, the new state claimed ownership of "the beds and shores of all navigable waters . . . ." Wash. Const. art. XVII, § 1, App. 152. The Legislature soon passed laws authorizing the

sale of tidelands "for commerce, trade or business." Wash. Laws 1895, ch. 178, §§ 54 and 62; Wash. Laws 1889-90 at 431. In its first session the Washington Supreme Court affirmed the state's "full power to dispose of [tidelands] subject to no restrictions save those imposed upon the legislature by the constitution. . ." ***Eisenbach v. Hatfield***, 2 Wash. 236, 245, 26 P. 539 (1891); *see also* ***Port of Seattle v. Oregon & Washington R.R. Co.***, 255 U.S. 56, 65 (1921) (recounting history of tideland development and noting that state was authorized to sell tracts of tidelands).

Consistent with Governor Stevens' promises, the treaties were, from the outset, interpreted as allowing the Indians to "hunt, fish and gather berries wherever they choose provided they do not interfere with private claims." Ex. D-090 (1867 letter from Superintendent of Indian Affairs). Thus, the United States in 1887 enforced the Tribes' rights against settlers who attempted to exclude Indians fishing for salmon or from traditional shellfishing grounds where the settlers had no exclusive rights. Ex. CA-001. But tidelands claimed exclusively by non-Indians were off limits to tribal shellfishing. The Tribes understood that they permanently lost their access to shellfish beds when settlers exercised their right to stake or cultivate such beds. Transcript at 431-34.

In 1905, the Commissioner of Indian Affairs ruled that the Treaty of Point Elliott, 12 Stat. 927, did not prevent the state of Washington from granting a lessee of its tidelands the right to exclude Indians (along with all others) from taking clams, even though "the clam beds in question have never been cultivated."

App. 212. Three years later, the Washington Supreme Court similarly held that the same state lessees could enjoin all persons, including Indians, from taking clams from the leased tidelands because, unlike fin fish, the clams "live, not merely upon, but actually within, the land [and]. . . in a very material sense, belong with the land." ***Sequim Bay Canning Co. v. Bugge***, 49 Wash. 127, 131, 94 P. 922 (1908).

The state's program to plat and sell tidelands continued from the year after Washington entered the Union, Wash. Laws 1889-90 at 431, until 1971, when the Washington Legislature repealed the statutes authorizing tideland sales. Wash. Laws 1971, 1st Ex. Sess. ch. 217, §2 at 994. Today, thousands of upland owners on Puget Sound's inlets and coves own adjacent tidelands, that are, quite literally, their backyards. The district court found that these petitioners took title without any notice of the Tribes' treaty claims, which were first asserted in 1989:

> The Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property. Indeed, many of these Growers and Owners purchased their land at or before the turn of the century, and they reasonably believed the land to be free of encumbrances and servitudes. Their belief was reinforced by the Tribes' failure to formally assert the Treaty right until over 100 years after the Stevens Treaties were signed.

App. 97.

D. The Lower Court Rulings.

This case was brought in 1989 by the United States and plaintiff Tribes against the State of Washington as a subproceeding to the 1970 fishing rights case. *See* ***United States v. Washington***, 384 F. Supp. 312 (W.D. Wash. 1974) ("***Washington I***"), *aff'd*, 520 F.2d 676 (9th Cir. 1975) ("***Washington II***"), *aff'd sub nom.*, ***Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n***, 443 U.S. 658 (1979) ("***Fishing Vessel***"). Petitioners, who are only a few of the thousands of individuals who own residential property that includes tidelands conveyed to them in fee, became defendants after seeking intervention. Docket 11623, 13561, 13668.

In bifurcated proceedings, the district court first entered an order declaring that the treaties secured to the Tribes the right to take 50 percent of the naturally occurring shellfish on both public and private tidelands. App. 51-93. In the second phase, the district court entered an implementation order. App. 95-134. This order authorized the Tribes to determine the quantity of available shellfish for harvesting by surveying any Private Owners' tidelands for shellfish following notice to the affected owner. App. 125. Private Owners may contest the Tribes' survey results by obtaining their own surveys. Disputes over the harvestable shellfish population are resolved by a special master. App. 126. The Tribes may then conduct harvests on Private Owners' tidelands up to five days per year. App. 127. Amending its implementation order, the district court further authorized tribal members to seek permission from a special master to cross private upland property to exercise

shellfishing rights on tidelands that lack access by boat or public road or right of way. App. 142-43. The special master is authorized to assess damages against tribal members who damage a Private Owner's property while exercising shellfishing rights. App. 127, 148.

All parties appealed the district court's final judgment. The Ninth Circuit affirmed the district court's interpretation of the treaties and most of the implementation order affecting the Private Owners. App. 23-25, 26, 38. However, in response to the Tribes' contention that Indians should be authorized to cross private upland property in the absence of "reasonable" alternative means to access tidelands, the Ninth Circuit directed the district court on remand to clarify its order regarding tribal access across the Private Owners' upland properties. App. 38 n. 16.

REASONS FOR GRANTING THE WRIT

Until this case, neither this Court, nor any of the Courts of Appeals, had held that an Indian treaty secured to Indian tribes a right to take resources from private lands. The Ninth Circuit's decision imposed servitudes on the very lands that the Tribes ceded when they entered into these treaties, in conflict with decisions of the Seventh and Eighth Circuits.

This Court has previously addressed the Stevens Treaties' "right of taking fish in common with all citizens," holding that these treaties reserved to the Tribes 50 percent of the sustainable catch of salmon that migrated from the ocean to the Indians' "usual and accustomed grounds and stations." ***Fishing***

Vessel, 443 U.S. 658, 685 (1978).[2] Relying on this Court's salmon precedents, the Ninth Circuit held that the right to take fish "in common with" Washington citizens gives the Tribes the right to enter on private property and to take 50 percent of the harvestable shellfish from the Private Owners' tidelands. This decision ignores the differences between migratory salmon, which can be monopolized by limitations on tribal access, and immobile shellfish that may be harvested on public and tribal lands throughout the territory ceded by these treaties.

Even if the right to take fish "in common with" Washington citizens could secure to the Tribes a right to take shellfish from tidelands from which the public is excluded, these treaties contain an express limitation–a treaty proviso prohibiting the harvest of shellfish on tideland beds "staked or cultivated by citizens." The Ninth Circuit failed to construe this proviso in light of the strong presumption that the treaties did not limit the State of Washington's right to convey private ownership interests in its tidelands free of any pre-statehood reservation of interest. The decision below adopts a technical definition of the term "staked" that was unknown to the treaty

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[2] These and similarly worded treaties were considered in six cases before the ***Fishing Vessel*** decision. *See*, ***United States v. Winans***, 198 U.S. 371 (1905); ***Seufert Bros. Co. v United States***, 249 U.S. 194 (1919); ***Tulee v. Washington***, 315 U.S. 681 (1941); ***Puyallup Tribe v. Washington***, 315 U.S. 681 (1942); ***Puyallup Tribe v. Dep't of Game of Washington***, 391 U.S. 392 (1968); ***Dept. of Game of Washington Game v. Puyallup Tribe***, 414 U.S. 44 (1973); ***Puyallup Tribe v. Dep't of Game of Washington***, 433 U.S. 165 (1977). However, none of these cases considered the Indians' right to harvest shellfish from tidelands.

Indians, analyzing legal issues of ultimate treaty interpretation as questions of fact reviewable only for clear error.

This Court should issue the writ and interpret the treaties in light of their plain meaning, their historical purpose of freeing the ceded lands from all Indian claims, and the constitutional presumption that the State of Washington could make its own laws and policies governing its tidelands free of any pre-statehood reservation of interest.

A. The Court Of Appeals' Decision Is An Unprecedented Extension Of Tribal Usufructuary Rights To Privately Owned Property That Is Unnecessary To Preserve The Tribes' Meaningful Access To Shellfish.

The Ninth Circuit's holding that the "right of taking fish in common with" the citizens of Washington allows the Tribes to harvest shellfish on privately owned tidelands is an unprecedented imposition of tribal usufructuary rights on private property. Its opinion conflicts with decisions of other circuits, cannot be supported by this Court's decisions interpreting the treaty right to migratory salmon, and is unnecessary to preserve to the Tribes meaningful access to an immobile resource found on public and reservation lands throughout the treaty territory.

1. The Treaty Right to Take Fish "In Common With" Citizens Does Not Extend To Shellfish On The Private Owners' Lands.

The petitioners' right to exclude others from their land is an unquestionable and essential attribute of ownership:

> We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks

> in the bundle of rights that are commonly characterized as property . . . ."

Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987) (citations omitted). The right to take fish "in common with" Washington citizens does not give Indians the right to enter tidelands from which the Private Owners exclude others.

This Court has previously noted that it will not lightly extend tribal usufructuary rights to private property. In ***Antoine v. Washington***, 420 U.S. 194 (1975), the Court interpreted an 1891 agreement returning unallotted land within the Colville Indians' reservation to the public domain. The agreement provided that "'the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.'" ***Antoine***, 420 U.S. at 197 n.4 (quoting agreement). This Court held that the right to hunt "in common with all other persons" only prevented the state of Washington from regulating hunting by tribal members on public lands, expressing doubt that such a hunting right could extend to private lands:

> A claim of entitlement to hunt on fenced or posted private land without prior permission of the owner would raise serious questions not presented in this case.

Antoine, 420 U.S. at 207-08 n.11; *see also* ***Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe***, 473 U.S. 753, 764 (1985) (Klamath tribe "agrees that ceded lands now privately owned may be closed to tribal hunting and fishing.").

Similarly, other Courts of Appeals have properly recognized that the primary purpose of nineteenth century

Indian treaties was the cession of aboriginal lands for non-Indian settlement, and that consequently privately owned non-Indian lands are off limits to tribal harvesting. Both the Seventh and Eighth Circuits have held that the Chippewa may not enter private land to exercise the treaty right of "hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded," Treaty with Chippewas, July 29, 1837, 7 Stat. 536:

> The ceded territories were ceded for the purpose of eventual settlement. Some may never be settled but others may be, and that settlement by going into private hands simply should not be subject to the reserved usufructuary rights.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 760 F.2d 177, 182 (7th Cir. 1985); ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt***, 700 F.2d 341, 365 (7th Cir. 1983) ("The exercise of these rights is limited to those portions of the ceded lands that are not privately owned."); ***Mille Lacs Band of Chippewa Indians v. Minnesota***, 952 F. Supp. 1362, 1378 (D. Minn.) (Chippewa "treaty rights . . . may only be exercised on lands, public or private, open to the general public for hunting, fishing and gathering by operation of state law."),*aff'd*, 124 F.3d 904, 933-34 (8th Cir. 1997), *cert. granted* __ U.S. __ (1998) (No. 97-1337).

The western Washington Tribes ceded all their "right, title and interest in and to the lands and country occupied by them" as did the Chippewa of Minnesota and Wisconsin. *See, e.g.* App. 178 (Treaty of Point Elliott, art. II). The future State's

right to convey tidelands to the exclusive possession of the Private Owners is as absolute as the United States' ability to patent exclusive title in the land ceded by the Chippewa. *See* Argument at § B.1, *infra*. The Ninth Circuit holding that the "right of taking fish . . . in common with all citizens" gives the Tribes the authority to enter on and harvest shellfish from thousands of privately owned parcels of property in Washington State conflicts with the decisions of other circuits that have properly recognized that extending tribal treaty rights to private lands is contrary to the very purpose of the Indian treaties.

2. Access To Privately Owned Tidelands Is Not Supported By This Court's Precedent And Is Not Necessary To Secure To The Tribes Meaningful Access To A Stationary Resource Found On Public And Reservation Tidelands.

This Court has imposed a narrow easement on private lands to enable Indians to exercise off-reservation salmon fishing rights only where necessary to secure meaningful access to a migratory resource, and only where the easement is analogous to a prescriptive right to access a usual and accustomed fishing site. The courts below misread this Court's precedent in imposing an unlimited extension of tribal usufructuary rights to thousands of individual Washington property owners.

In ***United States v. Winans***, 198 U.S. 371 (1905), this Court held that treaty Indians had a right to use a well-established trail over private land to their ancient fishing station

on the bank of the Columbia River.[3] The Court held that the treaty "fixes in the land such easements as enable the [fishing] right to be exercised." ***Winans***, 198 U.S. at 384. But the ***Winans*** holding did not grant the Indians a right to access all private land from which fish might be taken. The "usual and accustomed place" at issue in ***Winans*** was an obvious trail to an established fishing station in frequent and customary Indian use from treaty times to the date the land was patented. A ***Winans*** easement, as later described by this Court, must be "habitual," "customary," and "open and notorious." Consistent with well-established property principles, it exists:

> only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year, that any person, not negligently or wilfully blind to the conditions of the property he was purchasing, must have known of them.

Seufert Bros. Co. v. United States, 249 U.S. 194, 199 (1918).

The decisions below conflict with ***Winans*** and ***Seufert*** by granting tribal access to thousands of properties without any showing that the Tribes made historically open and consistent use of access easements on those properties. Rather than limiting tribal easements to those private uplands where "any person, not blind to the conditions of the property, must have

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[3]The case concerned similar language ("the right of taking fish at all usual and accustomed places") from a treaty negotiated by Governor Stevens with an inland tribe that fished at a site described by the Solicitor General as "a famous one . . . one of the best, if not the best place on the Columbia River." ***Winans***, 198 U.S. at 371 (Argument of United States).

known of them," ***Seufert***, 249 U.S. at 199, the courts below imposed an access easement of necessity on any upland property wherever "tribal members can demonstrate the absence of access by boat, public road, or public right of way." App. 142-43. This blanket easement over both tidelands and uplands, without any proof of historic use, is unsupported by this Court's precedents or by any principle of property law or treaty interpretation.

The unique nature of the migratory salmon resource was of critical importance in the relief granted by the Court in ***Winans*** and ***Seufert***. Access alone was insufficient to give meaning to the right to fish "in common with" non-Indians whose fish wheels took all of the salmon as they migrated upriver. ***Winans***, 198 U.S. at 372 (Argument of United States). Access to their ancient fishing site and removal of the fish wheels was thus necessary to assure the Indians "a share of the fish" and to "protect them from total exclusion from the fishery." ***Fishing Vessel***, 443 U.S. at 681.

The migratory nature of the salmon resource underlies this Court's holding that these treaties reserve to the Tribes salmon "taken from runs of fish that pass through the Indians' usual and accustomed fishing grounds." ***Fishing Vessel***, 443 U.S. at 689. Shellfish, however, are not migratory. In contrast to the free-swimming salmon at issue in this Court's previous cases concerning these treaties, shellfish found in privately owned land are immobile, and have historically been regarded as in the possession of the owner of the land where they are found:

> [T]here is a plain distinction between [embedded shellfish] and game birds or freely moving fish . . . . Such birds and fishes are not even in the possession of man. On the other hand, it seems not unreasonable to say that mussels having a practically fixed habitat and little ability to move are as truly in the possession of the owner of the land in which they are sunk as would be a prehistoric boat discovered under ground or unknown property at the bottom of a canal.

McKee v. Gratz, 260 U.S. 127, 135-36 (1922) (Holmes, J.) (mussels in Missouri stream bed) (citations omitted); *see also* ***Den ex. dem. Russell v. Association of the Jersey Co.***, 56 U.S. (15 How.) 426, 432-33 (1853).

Judge Beezer's opinion concurring in the decision below properly recognized that ***Winans*** and ***Fishing Vessel*** are based on the mobility of salmon, which must travel from the ocean upriver to their spawning grounds. Because shellfish are fixed in the tidelands, however, excluding Indians from Washington's private tidelands does not deprive the Tribes their treaty share:

> The underpinning of the [Supreme] Court's interpretation of the Stevens Treaties should not apply to shellfish because they are, with the exception of crustaceans, immobile. There can be no device that prevents the migration of immobile shellfish to, through or from the tribes' usual and accustomed fishing grounds.

App. 44 (Beezer, J., concurring). Each of the treaty Tribes' "usual and accustomed" fishing grounds, which together comprise all of Puget Sound, contain large areas of publicly held tidelands. It is in those tidelands that the Tribes have a treaty right to an equitable allocation of shellfish. The servitude

imposed upon Washington tideland owners by the courts below is not necessary to preserve the Tribes' right to "a fairly apportioned share" of the resource. ***Fishing Vessel***, 493 U.S. at 682.

The mechanistic application of ***Fishing Vessel's*** analysis to allocate 50 percent of stationary shellfish between the owners of private tidelands and the Tribes moreover resulted in the improper imposition on these private individuals of an extensive regulatory framework and dispute resolution process originally developed to preserve the Tribes' interest in each run of migrating salmon. App. 125-28. Such burdens, imposed not on sovereign entities responsible for common resources but on private landowners, will require continuing judicial intervention in the lives of thousands of Washington residents.

Under the Ninth Circuit's decision, the Indians have the right not just to take a fair share of shellfish "in common with" Washington citizens, but the exceptional authority to harvest shellfish on private tidelands from which the general public is lawfully excluded. The imposition of such a servitude on thousands of privately owned properties on the basis of a treaty right to fish "in common with all citizens of the Territory," raises an important issue of federal law that should be definitively resolved by this Court.

B. The Shellfish Proviso, Which Prevents The Tribes From Taking Shellfish From "Any Beds Staked Or Cultivated By Citizens," Prohibits Indians From Harvesting Shellfish On Tidelands Posted By Private Owners To Exclude Others.

The Private Owners stake and post their tidelands to mark their boundaries and exclude others. In the Shellfish Proviso, the treaty drafters expressly authorized the future state to limit the Indians' ability to enter on and harvest shellfish from "any beds staked or cultivated by citizens." The Ninth Circuit erred in refusing to construe this proviso in light of the established constitutional presumption against pre-statehood reservations of property interests under the equal footing doctrine. Moreover, the Ninth Circuit eschewed both the plain language of the treaties and the Indians' understanding that land was staked in order to mark boundaries and exclude others by holding that the term "staked" had a narrow and technical definition, limited to the marking of artificial shellfish beds to temporarily store shellfish, based on shellfishing practices then prevalent only on the East Coast.

1. The Treaty Drafters Did Not Intend To Limit The Future State's Ability To Establish Private Property Rights In Tidelands Under The Equal Footing Doctrine.

State control and title to the soil underlying navigable waters is one of the essential attributes of state sovereignty. *See* ***Idaho v. Coeur d'Alene Tribe of Idaho***, 521 U.S. 261, __ 117 S. Ct. 2028, 2041 (1997); ***Utah Div. of State Lands v. United States***, 482 U.S. 193, 195 (1987); ***Montana v. United States***, 450 U.S. 544, 552 (1981). Tidelands "were not granted

by the Constitution to the United States, but were reserved to the States respectively . . . The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States." ***Pollard's Lessee v. Hagen***, 44 U.S. (3 How.) 212, 230 (1845). Each state entering the Union has the right "to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters . . . ." ***Shively v. Bowlby***, 152 U.S. 1, 30 (1894).[4] There is a "strong presumption" against pre-statehood grants of submerged lands. A court "must not infer such a conveyance 'unless the intention was definitely declared or otherwise made plain,' or was rendered in 'clear and especial words,' or 'unless the claim confirmed in terms embraces the land under the waters of the stream.'" ***Montana***, 450 U.S. at 552 (citations omitted); *accord* ***Utah Div. of State Lands***, 482

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[4]Canvassing the diverse state law regulating private and public rights in tidelands during the nineteenth century, the ***Shively*** Court noted:

> [E]ach State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public.

Shively v. Bowlby, 152 U.S. 1, 26 (1894); *see* ***Port of Seattle v. Oregon & Washington R.R. Co.***, 255 U.S. 56, 65 (1921) (reviewing Washington State's nineteenth century tideland law and development and noting that private ownership and development of tidelands was a valid means of economic growth).

U.S. at 197-98; ***United States v. Alaska***, 521 U.S. 1, __, 117 S.Ct. 1888, 1906 (1997).

The Ninth Circuit improperly rejected the presumption that the United States did not intend to reserve interests in the tidelands of the future State, reasoning that the equal footing doctrine applies only to fee interest conveyances. But in enunciating the equal footing doctrine, the ***Shively*** Court noted that the State's "title to the shore and lands under water" consists of the entire bundle of rights that makes up fee simple title, including the right to "dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities . . . ." ***Shively***, 152 U.S. at 46 (quoting ***Hardin v. Lordan***, 140 U.S. 371, 381-82 (1891)). ***Winans***, which the courts below relied on in holding that "application of the Equal Footing Doctrine has already been rejected in the context of the Stevens Treaties fishing rights," App. 22, 82, analyzed the Yakima's reserved easement to access their ancient fishing stations in light of the presumption against a reservation of title to Columbia River shorelands. ***Winans***, 198 U.S. at 382-84.

The Tribes' claim to easements to enter upon and harvest shellfish from the property conveyed by the State to thousands of tideland owners, most of whom are not parties to the action, imposes the very "broad and vague servitude on all patented lands" that the Solicitor General disclaimed in seeking a specific easement over a specific parcel of land in ***Winans***. 198 U.S. at 373 (Argument of United States).

The equal footing doctrine's presumption against a conveyance or reservation of any portion of the future state's

title is especially strong where the right asserted to survive statehood is defeasible and not permanent:

> [W]here there are rights created by congress during the existence of a territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration.

Ward v. Race Horse, 163 U.S. 504, 515 (1896). The Shellfish Proviso expressly terminates a tribe's treaty right to take shellfish on lands that are "staked or cultivated." As in ***Race Horse***, the Tribes' reserved interests in tidelands are similarly "perishable" and cannot attach to tidelands conveyed in fee by the State of Washington to private owners following statehood. The Ninth Circuit's rejection of the presumption against a pre-statehood reservation of interest in Washington's tidelands conflicts with established precedent and should be reversed.

2. The Treaty Drafters Used The Term "Staked" To Prohibit Shellfish Harvesting On Tidelands Marked And Claimed Exclusively By Settlers.

The Ninth Circuit ignored settled rules of treaty interpretation in refusing to define the term "staked" in light of its commonly understood meaning and the purposes of these treaties. Interpretation of treaty language is a question of law that "begins with the text of the treaty and the context in which

the words are used." ***Eastern Airlines, Inc. v Floyd***, 499 U.S. 530, 534 (1991). Indian treaties are "construed, not according to the technical meaning of its words to learned lawyers, but in the sense which they would naturally be understood by the Indians." ***Fishing Vessel***, 443 U.S. at 676; *see* ***United States v. Choctaw Nation***, 179 U.S. 494, 531 (1900) ("If the words be clear and explicit, leaving no room for doubt what the parties intended, they must be interpreted according to their natural and ordinary significance."). Where the language of the treaty is susceptible to more than one meaning the courts employ canons of construction to discern the intent of the parties, determining the meaning of treaty terms according to the treaty's history, the negotiations, and "the practical construction adopted by the parties." ***Choctaw Nation of Indians v. United States***, 318 U.S. 423, 431-32 (1943).

In crafting the Shellfish Proviso, the treaty drafters removed *two* types of tidelands from Indian shellfishing claims–those that were either "staked" *or* "cultivated." Each reference to staking in the treaty negotiations referred to the common practice of marking boundaries to claim land as one's own. *See e.g.* Ex. D-064 at 371 (If the Cowlitz moved, they "wanted a white man to stake it out and put down corner Stakes."). At treaty time, the verb "to stake" was defined as "to mark the limits of, by stakes driven, as of a piece of land . . ." Ex. D-083. The Tribes' right to enter tidelands to harvest shellfish thus could be terminated by "staking"–marking the boundaries of tidelands to exclude others.

Instead of interpreting the term "staked" in accordance with its common meaning at the time of frontier settlement, the

courts below held that a "staked" bed was limited to tidelands upon which harvested shellfish were temporarily stored awaiting export. App. 26, 60, 64-66. It based this interpretation on nineteenth century practices in the Chesapeake Bay, where private shellfish could be stored on public tidelands so long as they were marked and not commingled with any substantial quantity of natural shellfish. App. 64-66. Rather than applying a definition that reflects "the common notions of the day and the assumptions of those who draft the treaty," ***Oliphant v. Suquamish Indian Tribe***, 435 U.S. 191, 206 (1978), the courts below adopted a definition of the term "staked" that was unknown beyond the confines of the mid-nineteenth century East Coast shellfishing industry and that limited, rather than fostered, the future state's ability to convey fee title to its tidelands.

In light of the undisputed historical record, the Tribes did not claim, nor did the courts below hold, that the treaty right to shellfish limited in any manner the future State's ability to convey tidelands into private ownership:

> The Tribes have not claimed a right to take shellfish from areas where natural beds no longer exist, such as from tideland areas housing factories, the Kingdome, and mills and ports. The Tribes appear to have conceded that some of the development along the tidelands, but not all, has extinguished their right to take fish from those particular areas.

App. 72. But by holding that the treaties nonetheless allowed the Tribes to harvest shellfish on private tidelands where natural beds have not been extinguished by development, the courts below treated the settlers' occupation and development of

tidelands as an historical anomaly, rather than as the right that was bargained for and secured as the principal purpose of the treaties.

3. The Ninth Circuit Improperly Treats The Meaning Of Treaty Language As A Question of Historical Fact Reviewed For Clear Error, Rather Than A Question Of Law That Is Reviewed De Novo.

The Ninth Circuit relied on East Coast oystering practices to define the word "staked" in part because it failed to conduct a de novo review of this largely undisputed historical record, reviewing the trial court's determination of the treaty parties' intentions instead under the deferential standard of clear error:

> Given the deferential standard by which we review the district court's findings of historical fact and its findings regarding the intentions of the parties' negotiators, we conclude the district court did not err in interpreting the Proviso and we adopt its analysis as our own.

App. 26.

Interpretation of treaty language is a question of law even if treaty meaning turns on historical issues of legislative intent and purpose. The Ninth Circuit's deferential review of district court "findings" in this case was improper and conflicts with this Court's precedents. For instance, in ***Fishing Vessel*** this Court independently reviewed the historical record to determine the meaning of the Tribes' right to fish in common with citizens of Washington territory. 443 U.S. at 675, 679. This Court's more recent cases similarly engage in a de novo interpretation of treaty terms in light of the negotiating and drafting history as well as the post-ratification conduct of the signatory parties.

See ***Zicherman v. Korean Air Lines Co., Ltd.***, 516 U.S. 217, 221-28 (1996); ***Eastern Airlines, Inc. v. Floyd***, 499 U.S. 530, 535-52 (1991); ***O'Connor v. United States***, 479 U.S. 27, 32-33 (1986).

Issues of historical purpose and legislative intent do not turn on the accuracy of witness' recollections or credibility. *Cf.* ***Zenith Radio Corp. v. Hazeltine Research, Inc.***, 395 U.S. 100, 123 (1969) (deference to district court on factual issues based on its "superior position to apprise and weigh the evidence"). Instead, to the extent they enable courts to determine the ultimate meaning of the treaty, these questions of historical intent lie at the heart of the role of the appellate court to define the controlling precedent that affects the rights of future litigants. The Ninth Circuit's decision erodes the primacy of the appellate court's duty to interpret the law. If left intact, the decision reduces the appellate court's task in treaty interpretation to reviewing for clear error a lower court's "findings" on fundamental questions of legislative and historical intent.

C. The Tribes' Claim To Enter On Private Tidelands Is Barred By Laches.

The Private Owners' lands have been off limits to Indians, and any other persons seeking to enter upon them, since conveyed to them by the State. The Tribes' treaty rights, first asserted in 1989, conflict with the Private Owners' long-settled property rights. The Private Owners join in the argument of the Growers in their separate petition for certiorari, ***Puget Sound Shellfish Growers v. United States***, No. 98-____, that the Tribes' claims are barred by the doctrine of laches.

RESPECTFULLY SUBMITTED this 21st day of December, 1998.

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Supreme Court, U.S.
FILED
1999
OFFICE OF THE CLERK

Nos. 98-1026, 98-1028, 98-1039, 98-1052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF WASHINGTON, *Petitioner*,

- and -

PUGET SOUND SHELLFISH GROWERS, *Petitioners*,

- and -

26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS ("UPOW"), *Petitioners*,

- and -

LARRY B. AND SHIRLEE ALEXANDER, *et al.* and WILLIAM AND CHARMOND ADKINS, *et al.*, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *et al.*, *Respondents*.

On Petitions For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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ABBREVIATIONS

CR	Clerk's Record (District Court Docket Number)
ER	Excerpt of Record (Prepared for Court of Appeals)
SER	Supplemental Excerpt of Record (Prepared for Court of Appeals)
PL-	Plaintiffs' Exhibit
D-	Defendants' Exhibit

INTRODUCTION

The four petitions for certiorari present ten questions, none of which implicates a conflict in authority among the Courts of Appeals or with a State Supreme Court. A number of questions rest on incorrect premises, and a number would require this Court to engage in the heavily factbound examination of the record already conducted by the courts below. In all instances, petitioners press arguments that mark a clear departure from the plain treaty language and this Court's precedents. The petitions should be denied.

The courts below held that, in entering into five nearly identical treaties with the tribes of western Washington (the Stevens treaties), the United States made a promise that the tribes would enjoy a permanent, meaningful right to take shellfish from natural shellfish beds and that this promise should be honored today. Under the treaties, (1) "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens," (the fishing right); (2) "*Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens" (the shellfish proviso). Treaty of Medicine Creek, Art. III, 10 Stat. 1132, 1133 (1854).

The majority of petitioners' questions concern the scope of the fishing right. Certiorari on those questions is unwarranted because in seven previous decisions this Court already has explored the meaning of that right and the courts below fully adhered to those decisions. There is no conflict with any other court.

This Court has not considered the shellfish proviso previously, but review of its meaning is unwarranted for two reasons: first, because there exist no other treaties containing language about shellfish beds, and the interpretation of the proviso therefore does not implicate any broader concerns; and, second, because the courts below reached their conclusion as to its meaning based on a careful, factbound examination of the type that this Court typically will not revisit. Petitioners also complain about the standard of review utilized by the Court of Appeals in addressing the proviso's meaning, but their claims of conflict or error on this point do not withstand scrutiny.

Finally, the dire harm claimed by petitioners from the decisions below is demonstrably overstated and unquestionably irrelevant to the treaties' interpretation. Because the Court of Appeals' decision is consistent with the previous opinions of this Court, and because no conflict exists with the decisions of any other court, the petitions should be denied.

STATEMENT OF THE CASE

I. Factual Background

From time immemorial, the Indian people of western Washington have been a fishing people, "us[ing] and rel[ying] on fish, including shellfish, for subsistence, ceremonial and commercial purposes." App. 69; *see also* App. 10. The uncontested archaeological and anthropological record demonstrates "widespread and sustained use of shellfish resources [by the tribes] for the last ca. 3,000 years," PL-587 at 41, with over a thousand archaeological sites evidencing continuous use by the tribes of at least 114 species of shellfish. SER 1026-27. At the time of the treaties, the tribes "engaged in extensive shellfishing." ER 54. Using the same seaworthy canoes they used for other fishing purposes, they took shellfish from deep water, and they also took large quantities of intertidal clams and oysters. Long lengths of kelp line joined together, for example, yielded sea urchins from deep water "in great quantity." SER 281-82; SER 695.[1] "Shellfish formed a staple in [the tribes'] diet," ER 55 (quoting *United States v. Aam*, 887 F.2d 190, 195 (CA9 1989)), and they were used for religious and cultural reasons, in trade with Indians and non-Indians, as tools and medicine, and for myriad other purposes. SER 1033-34, 696-97.[2]

The tribes' extensive reliance on shellfish was no mystery to the United States' treaty negotiators. App. 10. Underscoring the great commercial importance of shellfish to the Indians, Isaac Stevens, the Governor of the

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[1] The State's claim that tribes "did not venture into deep water to take shellfish" is thus inconsistent with the record. State Pet. at 2, 5.

[2] Petitioners' concerted efforts to minimize the importance of shellfish to the tribes cannot be squared with these findings, which the Ninth Circuit described as supported by "extensive persuasive evidence." App. 10.

Washington Territory, reported in 1854 that the Indians "catch most of our fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, (Fishing Vessel)* 443 U.S. 658, 666 n.8 (1979) (quotation omitted); ER 55. George Gibbs, the principal treaty draftsman, likewise recorded in his diaries that the Indians took a "great variety" of shellfish, and that "many of these [were] dried for winter stores." *Id.*

In 1854 and 1855, the United States and respondent tribes entered into the treaties at issue here. The United States sought to extinguish the Indians' title to land, while at the same time protecting the Indians' access to the fisheries on which it knew their survival and way of life to depend. App. 11. Prior to the negotiations, Governor Stevens expressed concern that settlers taking up Donation Act land claims had attempted to bar Indian access to fishing grounds. "The subject of the right of fisheries is one upon which legislation is demanded," Stevens wrote. *Fishing Vessel*, 443 U.S. at 666 n.9 (quotation omitted) "It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries." *Id.* (quotation omitted); PL-160, ch. 1 at 16.[3]

For their part, the Indians stated repeatedly during the negotiations that while they would cede millions of acres of territory, they had to retain meaningful access to the fisheries that were their lifeblood. As the district court observed, "it is clear from the treaty minutes that . . . the guarantee of fishing rights was a *sine qua non* of the Indians' participation in the Treaties. The Indians repeatedly raised concerns that they would not survive if they did not have access to their ancient fisheries." App. 67. The negotiation sessions thus

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[3] Settlers' claims under the Donation Act were to upland areas. The Alexander petitioners' contention that large areas of tidelands were covered by development at treaty times is incorrect. Pet. at 3. Although there were some mills and other developments on the tidelands, they covered a miniscule portion of the thousands of miles of shoreline. 1994 Tr. at 1707, 1713-14. Given that they knew that abundant shellfish were taken even in the vicinity of populous cities like New York and Boston, the treaty commissioners had no reason to believe that the nascent tideland development in the Puget Sound posed any threat to the Indians' use of the "inexhaustible" shellfish resource. App. 72; SER 128-30.

reaffirmed the American commissioners' conviction that the treaties had to preserve for the tribes their ability to continue their fishing way of life. Not only did the United States' negotiators recognize that the "Indians viewed a guarantee of permanent fishing rights as an absolute predicate to entering into a treaty with the United States," App. 11, but they also saw such a guarantee as ensuring against Indian dependence on the United States for support, a result they explicitly had been told to avoid. App. 69; ER 699.

Accordingly, Governor Stevens promised the Indians that under the treaties they would enjoy a permanent, meaningful right to continue their fishing way of life:

> The one significant promise for purposes of this litigation is the promise by the United States to the Indians that they would enjoy a permanent right to fish as they always had. This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. The Indians were repeatedly assured that they would continue to enjoy the right to fish as they always had, in the places where they had always fished. There is no indication in the minutes of the treaty proceedings that the Indians were ever told that they would be excluded from any of their ancient fisheries.

App. 27 (quoting App. 67). Stevens declared that "[t]his paper secures your fish," *Fishing Vessel*, 443 U.S. at 667 n.11 (quotation omitted), and there is no suggestion in the treaty records that the United States intended, or the Indians understood, the shellfisheries to be excluded from this fundamental promise. App. 67-68. As the district court put it, the Indians did not "believe[] that their need for shellfish would diminish over time," App. 70, but instead believed themselves to be "bargaining for a permanent right." *Id.*

The United States negotiators also sought to protect the non-Indian "shellfish-cultivation industry [that] had begun to develop at Shoalwater Bay in the Washington Territory" and that was "modeled after the larger, older, and more developed shellfish industry on the east coast." App. 11, 64-65. This industry was based on the creation of shellfish beds for storage or growth purposes where natural beds of that shellfish type did not exist. As the district court found and

the Court of Appeals affirmed, these man-made beds were commonly referred to as "staked" or "cultivated" beds:

> Shellfish farmers created "cultivated" beds (ones on which shellfish spawn would not naturally set) by removing oysters from their natural beds to areas where they could grow more rapidly, or by placing shells or other material to harden the bottom and thereby facilitate the setting of the oysters. In addition to creating cultivated beds, shellfish farmers frequently "staked" beds of shellfish by storing market-sized shellfish removed from other beds until they could be shipped to market. These staked beds did not naturally contain shellfish of the type being stored, and their boundaries were marked for identification purposes with stakes extending above the surface of the water at high tide.

App. 11.

While exclusive rights to staked or cultivated beds could be created, the public at treaty times vigorously insisted on its right of access to natural shellfish beds, and that right was consistently upheld in court decisions and by statute.[4] Newspaper and magazine articles, industry treatises, letters and journals written by commercial fishermen and, most importantly, the writings of the treaty commissioners themselves, consistently drew the same distinction between staked or cultivated and natural shellfish beds. As the courts below concluded, then, in prohibiting tribal shellfishing from "beds staked or cultivated by citizens," the treaty negotiators provided protection for the artificial beds that formed the foundation of the growing shellfish industry in the Washington Territory, while remaining faithful to their promise that the tribes would retain a permanent right of access to their fisheries, including the natural shellfish beds.[5]

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[4] The growers are incorrect in claiming that the law was not uniform. Growers' Pet. at 5, 8. Before the treaties only Rhode Island had even briefly allowed the staking or cultivating of a natural shellfish bed, but it rescinded that provision before the treaties. PL-160, ch. 2 at 40-41.

[5] Petitioners repeatedly claim that the proviso interpretation set forth by the courts below rests solely on a technical interpretation of "east coast" law. State Pet. at 10, 28; Grower Pet. at 5, 8; Alexander Pet. at 11, 20,

The promise was kept for many decades. In the first two decades after the treaties the Territorial legislature passed general statutes regulating the taking of shellfish on four occasions. SER 870-72. Each of those statutes provided legal protection for creators of artificial shellfish beds while maintaining the public's right to take shellfish from natural beds. After Washington's admission to the Union in 1889 it passed statutes permitting the sale of tidelands. App. 12. However, even after more than a decade of private ownership, the State continued to recognize that the public generally, and treaty Indians in particular, could take shellfish from natural beds on those tidelands. PL-160, ch. 4 at 39-43; SER 898-900. It was not until more than fifty years after the treaties that the Washington Supreme Court held, without any specific consideration of treaty rights, that a lessee of tidelands could exclude the general public from natural beds. *Sequim Bay Canning Co. v. Bugge*, 94 P. 922 (Wash. 1908). In the years following, the State sold off the "vast majority" of its tidelands, App. 73,[6] and the tribes who had been promised permanent rights to their fisheries saw

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25. Mere repetition cannot make this so. To the contrary, the "district court 'interpret[ed] the terms 'staked' and 'cultivated' as the terms were defined and used in the shellfishing industry at and before treaty time.'" App. 26 (quoting App. 77). The "compelling and persuasive" evidence, App. 55, the court canvassed regarding the proviso's meaning included not simply the legal framework of the time, but also "evidence of actual shellfish industry practices" on the east coast *and* in the Washington Territory, App. 61, including industry treatises, newspaper articles, and *the writings of George Gibbs, the principal treaty drafter*. App. 60-66.

The State would also have this Court believe that the district court simply "assumed" that the treaty negotiators were familiar with the shellfishing industry and its terminology. State Pet. 10, 28. However, the district court found the evidence that the United States' negotiators were familiar with the shellfish industry (on both coasts) and drew the terms of the proviso from it to be "compelling" and "overwhelming[]," App. 55, 59, 78, and likewise found that the Indians were familiar with the practices at Shoalwater Bay, App. 65-66. These findings are unassailable. Indeed, *petitioners' own expert* conceded that the treaty negotiators "borrow[ed] from the oystermen's terminology" to draft the proviso, D-467 at 108.

[6] Despite this clear finding of fact by the district court, petitioners continue to assert that only about half of the tidelands have been sold. *See, e.g.*, State Pet. at 3, Alexander Pet. at 2.

their ability to take shellfish deteriorate as the State enforced trespass laws against tribal harvest. PL-160, ch. 4. By the time of this subproceeding, the tribes' harvest of shellfish had been reduced to a negligible percentage of the non-Indian harvest. SER 971. And the effect of the broken promise is clear. As the district court found and the Court of Appeals affirmed, "[t]he uncontroverted evidence presented at trial is that the Tribes lag significantly behind other residents of the State of Washington in their overall standard of living." App. 33.

The shellfish and other fish resources have themselves changed radically since the time of the treaties. Native oyster populations have diminished by 99%, and have been replaced by the exotic pacific oyster. SER 1004-05. Native littleneck clams have also been largely supplanted by the introduced manila clam. App. 12. The native geoduck clams that were once available in commercial quantities on the intertidal beaches of Puget Sound are now found almost exclusively in deep water as a result of non-Indian overharvest in the shallow areas. SER 992.

As the treaty negotiators intended, the commercial shellfish industry in Washington has prospered. Today the pacific oyster is the dominant species cultivated in Washington, accounting for about 60% of the annual harvest value. PL-988, Tbl. 50. Because pacific oysters do not reproduce naturally except in some areas of Hood Canal, virtually all pacific oyster beds are "artificial" under the interpretation of the shellfish proviso consistently advocated by the tribes and adopted by the courts below, and are thus off-limits to tribal harvest. In recent years, numerous artificial beds of manila clams have also been created by the growers through seeding or alteration of the substrate, and the tribes have again disclaimed any rights to those beds. PL-535, vol. 1, ch. 6 at 13.

II. Course of Proceedings

In 1970 the United States sued Washington to implement the fishing rights of several Indian tribes. The district court held, and this Court ultimately affirmed, that the tribes have a right to take up to half of the anadromous fish found in their fishing areas. *Fishing Vessel*, 443 U.S. at 671, 685-87.

The district court retained jurisdiction to adjudicate the tribes' rights to other fish species.

The shellfish subproceeding began in 1989. ER 9. By pretrial motion, the district court held that under the plain language of the treaties, and the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative," *Colautti v. Franklin*, 439 U.S. 379, 392 (1979), the "right of taking fish" includes the right to take shellfish. App. 56.[7] The court then held an exhaustive three-week bench trial, after which it issued an opinion holding that the tribes' rights of taking shellfish are co-extensive with their rights to other fish, except to the extent limited by the shellfish proviso. App. 52-53. The court concluded, based on evidence it considered "compelling," App. 55, 59, and "overwhelming[]" App. 78, that the proviso limits tribes from taking shellfish only from those artificial shellfish beds created by citizens where no natural bed of that species exists.[8] App. 77.

The district court then issued two orders imposing stringent limitations on tribal shellfishing in order to protect the interests of private landowners. The court held that the tribes may harvest shellfish from private tidelands – even for subsistence purposes – only five days a year (with some increase on larger lots), and only after providing landowners with one-month's notice and conducting (at their own expense) scientific surveys establishing the presence of natural shellfish populations. App. 126-27. The court also prohibited tribal access across privately owned uplands to reach shellfishing areas unless "[t]ribal members can demonstrate the absence of access by boat, public road, or public right of way." App. 146. All parties appealed.

The Court of Appeals, in an opinion by Judge Trott, affirmed the district court's interpretation of the treaties. The court also affirmed the stringent limitations placed on

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[7] No petitioner challenged this holding in the Court of Appeals, and none challenges it here.

[8] The court did not say that a cultivated area could "never" have supported a natural bed. State Pet. at 10. Under the court's opinion, for example, an artificial bed of pacific oysters can be created on a site where the native oyster existed long ago.

tribal shellfishing from private tidelands and on uplands access. App. 37-40.[9] Finally, the Court of Appeals made it clear that the tribes are permitted a share only of those shellfish that would be present naturally on the commercial growers' beds absent the growers' efforts; the growers are entitled to the entire fruits of their labor and investment in their tidelands. App. 33-35. The court then remanded for a factual determination of what portion of each growers' beds are exempt from tribal harvest because they result from the growers' efforts. *Id.* The district court has referred remanded issues to another judge for mediation. CR 16608.

REASONS FOR DENYING THE PETITIONS

I. The Court of Appeals Created No Conflict by Refusing to Graft Species or Technology-Based Limitations Onto Express Treaty Language.

The State seeks certiorari on the question whether "there is a treaty right to take half of an off reservation natural resource, such as deep water shellfish, where Indians did not take that resource at treaty time." State Pet. i. The question rests on an incorrect factual premise, does not implicate any conflict in authority, and seeks a repudiation of the plain language of the treaties.

The treaties here reserve to the tribes the right of taking "fish," which, as the courts below noted, has "'perhaps the widest sweep of any word the drafters could have chosen.'" App. 18 (quoting App. 57). The tribes may exercise their fishing right "at all usual and accustomed grounds and stations," and those grounds and stations have already been adjudicated (in decisions which are long since final) to include significant expanses of deep water. App. 159. At treaty times the tribes took virtually every shellfish species imaginable, including species like geoduck, crab and urchins that today are found predominantly in deep water,[10] and they

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[9] While the tribes continue to believe that the restrictions are overly harsh, they have not sought certiorari.

[10] *See, e.g.*, SER 1026, 181, 213, 792-97, 1027, 1049, 1053-56, 1096 (archaeological and anthropological evidence that tribes took at least 114 species of shellfish, including cucumbers, urchins, scallops, crabs, octopus, and geoduck).

took those shellfish from deep and shallow water.[11] The factual premise of the State's question is therefore incorrect, and its resolution would not affect the ultimate outcome in this case.

Moreover, there is no definable "resource, such as deep water shellfish." The State's focus is on species of urchin, geoduck, crab, cucumber and shrimp. While these species might be termed "resources," it is highly inaccurate to imply that they are exclusively deep water ones. Through time, advances in technology have enabled both non-Indians and Indians alike to take those species more efficiently from deep waters, and documented overharvesting by non-Indians has reduced the abundance of those species in shallow waters. While the State denies it, State Pet. at 18 n.9, what it necessarily seeks is a ruling that the tribes should not be able to take advantage of technological advances to harvest shellfish from "deeper" waters within their usual and accustomed grounds and stations.[12]

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[11] *See, e.g.*, SER 281-82, 695, 790-97, 1049-56 (describing deep water shellfishing techniques including breath-hold diving, kelp-line sinking, spearing, and dip netting). The State's claim that the tribes did not take shellfish from deep water misstates this record, which includes testimony by the State's own experts and the contemporaneous observations of non-Indians, including George Gibbs. Indeed, in the one usual and accustomed area determination it had to make as part of this proceeding, the district court found that the Upper Skagit Tribe "took fish, including shellfish" from numerous marine areas that include deep as well as shallow water. App. 91-92. (The other respondent tribes have long had adjudicated fishing areas that encompass deep water.) That finding was not appealed.

[12] Although not clear, it is possible that the State is also attempting to resurrect an argument made below that the courts should define a separate set of fishing areas for each of the hundreds of species of fish that are part of the tribal fishing right. That issue is patently inappropriate for certiorari. The decision of the courts below to adhere to the plain language of the treaties and hold that each tribe has one set of usual and accustomed grounds and stations within which it may exercise its right of taking fish is not in conflict with any other decision. In fact, as the Ninth Circuit noted, courts in this litigation have always proceeded on the basis that each tribe's adjudicated usual and accustomed grounds and stations apply to all its fishing activity. App. 19-20. Moreover, the State's proposal to define hundreds of sets of fishing areas is judicially unworkable in the extreme. App. 20.

But whether the State is arguing for a technology-based or a species-based limitation on the tribes' express fishing right, the issue it raises is not worthy of certiorari. The Court of Appeals' holding is grounded in the plain language of the treaties. "With all deference to the State, there is no language in the Treaties to support its position: the Treaties make no mention of any species-specific or technology-based restrictions on the Tribes' rights." App. 18. While the State argues that the Court of Appeals' fidelity to the treaty language brought it into conflict with this Court's decisions in *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), and *Fishing Vessel*, and with various other decisions, no court has ever adopted the State's position.

Seufert held that the Yakama Tribe had a right to take fish on the Oregon side of the Columbia River, even though that area was outside the Yakama Tribe's ceded territory, because tribal members had habitually fished there. 249 U.S. at 198-99. That the Court examined *where* tribal members had customarily fished is unremarkable, because the treaties restrict the tribes' fishing right to their "usual and accustomed" places. The Court nowhere suggested, however, that an implicit restriction should also be grafted onto the treaties limiting the tribes to their traditional fishing *methodology* or to *species* taken at treaty times. Indeed, in *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), this Court rejected such a rewriting of the treaties:

> [T]he *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed" places *in the "usual and accustomed" manner*. But the treaty is silent as to the mode or modes of fishing that are guaranteed.

Id. at 398 (italics in original).

Nor does *Fishing Vessel* contain any intimation that the tribes are restricted to fishing methodologies used or species taken at treaty times. The State points to the statement that the treaty language "'securing' certain fishing rights . . . [is] synonymous with 'reserving' rights previously exercised," 443 U.S. at 678, but ignores the Court's very next words describing that previously exercised right as quite simply

"the [tribes'] right to meet their subsistence and commercial needs by taking fish from treaty area waters," *id.* at 679, not some circumscribed right of doing so only in a certain manner or only with respect to certain species.[13]

The State further alleges a conflict between the decision below and two district court decisions, *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), and *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin ("LCO")*, 653 F. Supp. 1420, 1426-29 (W.D. Wis. 1987). A conflict with a district court decision is not a basis for certiorari. Rule 10. Moreover, both *Michigan* and *LCO* are entirely consistent with the Court of Appeals' decision here. The court in *Michigan* looked to the tribes' historic practices only to determine that a fishing right should be *implied*. It then held that such a right cannot be limited to the species taken at treaty times or the methods then used:

> The Indians' right to fish, like the aboriginal use of the fishery on which it is based, is not a static right. The reserved fishing right is not affected by the passage of time or changing conditions. The right is not limited as to species of fish, origin of fish, the purpose of use or the time or manner of taking. The right may be exercised utilizing improvements in fishing

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[13] The State also alleges a conflict between the decision below and statements by the district court in the earlier phases of this litigation (including a finding quoted in *Fishing Vessel*, 443 U.S. at 667-68). Of course, even if there is such a conflict, it is not the stuff of certiorari. And there is not. Long ago, the district court concluded that "[t]he right secured by the treaties to the Plaintiff tribes is not limited as to species of fish, the origin of fish, the purpose or use, or the time or manner of taking." 384 F. Supp. at 401. It further found that "Indian fishing was not limited to any species. They took whatever species were available at the particular season and location." 384 F. Supp. at 352. The district court has never retreated from these findings and conclusions and they have been affirmed in all respects on appeal. 520 F.2d at 693.

The State claims that an interim procedural order, known as Paragraph G, 459 F. Supp. at 1037-38, requires the tribes to put on evidence of treaty time activity before being able to engage in that activity now. State Pet. 15. However, the language of the order is entirely permissive, and in entering it the district court did not purport to alter its substantive analysis of the treaties.

> techniques, methods and gear. It may expand with the commercial market which it serves, and supply the species of fish which that market demands, whatever the origin of the fish.

471 F. Supp. at 260. The *LCO* court came to the same conclusion. 653 F. Supp. at 1430.[14]

Finally, the State alleges a conflict with two Court of Appeals' decisions. In *United States v. Dion*, 752 F.2d 1261 (CA8 1985) (*en banc*), *rev'd in part*, 476 U.S. 734 (1986), the court refused to *imply* a treaty right to sell eagles. That holding provides no support for rewriting express treaty language. *United States v. Top Sky*, 547 F.2d 486 (CA9 1976), is a previous decision of the Ninth Circuit and so cannot give rise to a circuit split. Moreover, the *Top Sky* court only held that a treaty right to hunt would not have been understood by the treating Indians to extend to the right of selling eagles because they deplored such a practice. *Id.* at 487-88. Here, the record contains no suggestion that the tribes understood their right of taking fish to be saddled with any technological or species-based limitations, and there is accordingly no tension between *Top Sky* and this case.[15]

The Court of Appeals' refusal to graft unstated restrictions onto express treaty language therefore is not in conflict with the decision of any court. Moreover, the holding is manifestly sound. It is faithful to the plain language of the treaties and a treaty record showing that neither the United States nor the Indians understood that the tribes' fishing rights would be limited to treaty time practices. The State has not presented a basis for certiorari.

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[14] The *LCO* court later concluded that a commercial lumbering right should not be *implied* in treaties that secured the right to hunt, fish and gather wild rice, because the tribes had not engaged in that activity at treaty times. 758 F. Supp. 1262, 1271 (W.D. Wis. 1991). Again, that holding suggests nothing about the contours of a right explicitly reserved.

[15] The State's own historian testified that no evidence exists of an intent to exclude any species from the tribes' fishing rights. SER 270-71.

II. Equal Sharing of The Fish Resource Is a "Matter Decided" and No Conflict Exists.

The State claims that the courts below erred in holding that the tribes are presumptively entitled to an equal share of a "resource, such as deep water shellfish, . . . where there was no historic dependence on that resource that would support an equitable allocation." State Pet. i. The State argues that the district court instead should have calculated the historic dependence of the tribes on each of the more than one hundred different species of shellfish (in fact, to be more precise, that the court should have evaluated the tribes' dependence on deepwater harvesting of each of those species), and then done a species-by-species allocation. The State's proposed factual tangle again rests on an incorrect premise and fails to implicate any conflict in authority. The approach taken by the courts below is fully consistent with this Court's precedent.

As a threshold matter, the State did not raise this issue in the district court. There it argued that the tribes' fifty percent share should be reduced because the tribes had attained a moderate living, but it never questioned the appropriateness of an equal share as the presumptive starting point in allocating the treaty right. The State first raised the issue in the Court of Appeals, and the tribes identified the State's failure to preserve the issue in their briefing to that court. Brief of Indian Tribes at 95. The Court of Appeals rejected the State's argument without addressing it, and it is inappropriate for review here. *City of Springfield v. Kibbe,* 480 U.S. 257, 259-60 (1987).

The State, moreover, continues to ignore the uncontroverted evidence that at treaty times the tribes relied upon significant harvests of the various species that the State characterizes as "deep water shellfish." *See supra* at 9-10 & nn.10, 11. The tribes have demonstrated a "historic dependence" on those species, and resolution of the question presented would therefore have no effect on the outcome below. If the State's real assertion, on the other hand, is that the tribal allocation should be reduced because those species are principally harvested in deep water today, then it is simply restating its technology argument and certiorari is inappropriate for the reasons outlined above.

Even if one overlooks the question's defects, the State's argument for certiorari does not hold up. The State does not allege a circuit split. It only claims that the courts below failed to follow the "analytical steps laid out in *Fishing Vessel*." State Pet. 19. But this is not so. The *Fishing Vessel* Court engaged in a three-step analysis of the tribes' right to an allocation. First, it found that the tribes are entitled to a division of fish. 443 U.S. at 678-79. Second, as to allocation it held that "an equitable measure of the common right should initially divide the harvestable portion . . . into approximately equal treaty and nontreaty shares." *Id.* at 685.[16] Third, it stated that the treaty share should be reduced "if tribal needs may be satisfied by a lesser amount." *Id.* "Thus, [u]pon proper submissions to the District Court . . . in response to changing circumstances," *id.* at 686-87, the tribal share can be modified.[17]

The district court conducted just that analysis. First, it concluded that shellfish are "fish" within the meaning of the treaty right, an issue no longer contested by any petitioner. ER 52-55; App. 56. The court then made an initial division of the resource into equal treaty and non-treaty shares. App. 84. It then examined whether any change in circumstances had occurred such that it should reduce the tribal share. Because "[t]he uncontroverted evidence presented at trial is that the Tribes lag significantly behind other residents of the State of Washington in their overall standard of living," App. 85, it declined to do so.[18]

The State argues that the district court instead should have performed a species-by-species allocation based solely

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[16] The Court explained that the logic of a presumptively equal share given the "in common with" language of the treaties "is manifest." *Id.* at 687 n.27. "Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset . . . ." *Id.*

[17] The Court provided examples of the kinds of changed circumstances it had in mind, such as a tribe dwindling "to just a few members," or "abandon[ing] its fisheries" after finding other sources of support. 443 U.S. at 687. No petition argues that either event has taken place.

[18] Only UPOW asks this Court to review the district court's determination regarding the tribes' current economic condition. UPOW Pet. 27-29. UPOW's factbound claim of error is an inappropriate candidate for certiorari.

on the tribes' historic use of different species. This is directly at odds with *Fishing Vessel*'s holding that the starting point in allocating a common right is an equal division of the resource. 443 U.S. at 685. Indeed, the district court has never examined the relative dependence of the tribes on each of the various species of finfish and the *Fishing Vessel* Court did not suggest that it should have. The Court did note the district court's equal allocation of those species to be consistent with other natural resource cases where, after implying a right to a resource based on historic usage, the courts have accorded tribes enough of the resource to ensure their reasonable livelihood. *Id.* at 685-86. But the Court never suggested that instead of starting with a presumptively equal allocation of an express common right a court should do a variegated species-by-species allocation analysis. Thus, there is no conflict between *Fishing Vessel* and the holding of the courts below. No court has ever interpreted *Fishing Vessel* as does the State, and the State has failed to present a basis for certiorari.

III. It Is a "Matter Decided" that the Stevens Treaties Provide a Right of Access to Private Property and Override the Presumption of the Equal Footing Doctrine, and No Conflict Exists.

Half of petitioners' questions go to the issue whether, even setting the shellfish proviso to the side, the tribes may exercise their right to take shellfish on privately owned tidelands.[19] This, however, is a matter long since decided. For more than ninety years this Court has held that the Stevens treaty right of taking fish includes the right of using private property, and that neither state-law principles nor the Equal Footing Doctrine can impair that right. In light of this settled law, petitioners' claims of conflict ring hollow.

A. Right of Access

UPOW and the Alexander petitioners present the broadest challenge, arguing that the treaty fishing right does not provide for a tribal right of access to privately owned tidelands to take shellfish. They argue that the Ninth Circuit's decision "is an unprecedented imposition of tribal usufructuary rights on private property." Alexander Pet. 12.

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[19] *See* State q.2; Alexander q.1; Growers q.2; UPOW qq.1, 3.

This is incorrect. No petitioner appealed the district court's decision that the treaty fishing right subsumes the right of taking shellfish, and *United States v. Winans*, 198 U.S. 371 (1905), squarely held that under the Stevens treaties the tribes may utilize private property to exercise that right:

> [T]he Indians were secured in [the] enjoyment [of their fishing right] by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for – in other words, the Indians were given a right in the land – the right of crossing it to the river – the right to occupy it to the extent and for the purpose mentioned.

Id. at 381. Fourteen years after *Winans*, in *Seufert*, this Court upheld the rights of the Yakama tribe, without regard to private land ownership, not only to take fish on the banks of the Columbia River but to build houses on those banks to dry and cure their fish. 249 U.S. at 197-99. And sixty years after that decision, in *Fishing Vessel*, this Court was unanimous in the view that the treaty right of taking fish includes the right of using private property for that purpose, with the dissent arguing that this was a core function of the treaties:

> As was made clear in *Winans*, the purpose of the treaties was to assure to Indians the right of access over private lands so that they could continue to fish at their usual and accustomed fishing grounds.

443 U.S. at 707; *see also id.* at 677 n.22. Thus, whereas petitioners criticize the Court of Appeals for "impos[ing] servitudes" on their lands, Alexander Pet. 10, this Court has long recognized that it is the Stevens treaties themselves that "impose[ ] a servitude upon every piece of land as though described therein." *Winans*, 198 U.S. at 381.

Petitioners seek to distinguish *Winans* on two grounds. First, they argue that the only private property the tribes can utilize are "well-established trail[s]" to which they have established a "prescriptive right" through decades of open and continuous use. Alexander Pet. at 15-16; UPOW Pet. at 16-17. However, *Winans* described the scope of the treaty

servitude in much broader terms, stating simply that the treaty "fixes in the land such easements as enables the right to be exercised," 198 U.S. at 384, which is consistent with the plain language of the treaties preserving to the tribes the right of access to "*all* usual and accustomed" fishing areas. Moreover, *Winans* flatly rejected the notion that under the treaties the tribes "acquired no rights but such as they would have without the treaty." 198 U.S. at 380. To limit the treaty servitude to nothing more than a prescriptive easement that any person could establish would be to turn *Winans* completely on its head. Finally, *Fishing Vessel* is directly to the contrary, interpreting *Winans* and *Seufert* to hold that the tribes have rights "beyond those which other citizens may enjoy," 443 U.S. at 681 (quotation omitted), including the right "to cross private lands," *Id.* at 676 n.22. Again, the dissent agreed, stating that "this right, described in *Winans* as a servitude or right over land not owned by the Indians, entitled the Indians to trespass on any land when necessary to reach their traditional fishing areas, and is a right not enjoyed by non-Indian residents of the area." *Id.* at 703.

Petitioners also argue that *Winans* does not apply because it involved migratory salmon rather than immobile shellfish, and a right of access is more necessary to ensure the tribes a fair share of the former. But *Winans* did not turn on the nature of the fish being taken. And petitioners' claim that tribes can more easily secure a fair share of shellfish than salmon without access to private property is both illogical and does not withstand even a superficial examination of the record, which indicates that the "vast majority" of tidelands in Washington State are now in private ownership, App. 73, including those tidelands most naturally productive of shellfish. SER 999-1002.[20]

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[20] Petitioners are also incorrect in arguing that shellfish fall outside *Winans* because they are part of the realty under state law. Shellfish are in fact personal property, *see Edison Oyster Co. v. Pioneer Oyster Co.*, 157 P.2d 302, 307 (Wash. 1945), but their precise state law status is immaterial. *Winans* rejected the notion that treaty rights can be impaired by state law, 198 U.S. at 379, a holding reaffirmed in *Fishing Vessel*, where this Court stated that non-Indians "may not rely on property law concepts" to defeat tribes' treaty fishing rights. 443 U.S. at 684.

The decisions below therefore adhered to nearly a century of precedent from this Court. Hence, petitioners can make only the weakest allegations of a conflict. They note that in *Antoine v. Washington*, 420 U.S. 194, 207-08 n.11 (1975), this Court did not reach the question of a tribe's hunting rights on private land under an 1891 agreement. But that obviously does not take away from what this Court did say in *Winans* and *Fishing Vessel* about fishing rights under the Stevens treaties.

By the same token, that the courts in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt ("LCO")*, 700 F.2d 341 (CA7 1983), and 760 F.2d 177 (CA7 1985), and *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (CA8 1997), *cert. granted on other grounds*, 118 S. Ct. 2295 (1998), found that, under the treaties before them, the Chippewa tribes do not have a right to exercise their rights on private property, says nothing about the proper construction of the Stevens treaties. Those cases simply do not enunciate a general principle that all Indian treaties preclude tribal access to private property; they very clearly limit their holdings to the treaties considered there.[21]

Finally, UPOW's claim that the decision below conflicts with a line of Washington cases beginning with *Sequim Bay Canning Co. v. Bugge*, 94 P. 922 (Wash. 1908), is frivolous. UPOW Pet. 20. Those cases merely hold that, under state law, the owners of private tidelands may exclude others from harvesting clams from their tidelands. They do not address the effect of the Stevens treaties on this general rule.[22] Indeed, the only reported Washington decision to address the

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[21] The treaty language, and the courts' findings of fact about the tribes' expectations for using private property, differ considerably. Neither the *LCO* nor the *Mille Lacs* treaties provide the treating tribes with a right to exercise their usufructuary rights at "all usual and accustomed grounds and stations." *See LCO*, 700 F.2d at 345; *Mille Lacs*, 124 F.3d at 910. Indeed, in neither *LCO* nor *Mille Lacs* did the plaintiff tribes even claim a right of access to private property. 700 F.2d at 364 n.14; 952 F. Supp. at 1376; 861 F. Supp. at 789 n.2.

[22] Nor do these cases, or other twentieth-century cases cited by petitioners, *see, e.g., McKee v. Gratz*, 260 U.S. 127 (1922), have any bearing on the understanding of the treaty terms prevalent in the mid-nineteenth century.

tribes' shellfishing rights is fully consistent with the decision below. *See Washington v. Courville*, 676 P.2d 1011 (Wash. Ct. App. 1983) (holding that shellfish fall within the right of taking fish).

B. The Equal Footing Doctrine

Petitioners also argue that, even if the treaty right of taking fish includes an entitlement to enter private property to exercise the right, the entitlement implicitly was abrogated under the Equal Footing Doctrine upon the admission of the State of Washington into the Union. Petitioners' argument does not present a conflict of authority or any other basis for certiorari, because in *Winans* this Court squarely decided the point, holding that the United States intended the Stevens treaty fishing right to bind the future State and to override the presumption of the Equal Footing Doctrine. That holding is dispositive here.[23]

The United States has always possessed the power to make pre-statehood conveyances of title "whenever . . . necessary to do so in order to perform international obligations . . . or to carry out other public purposes appropriate to the objects for which the United States holds the Territory." *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). In *Winans*, this Court held that in the Stevens treaties the United States clearly intended to reserve to the tribes the ability to use private property to effectuate their fishing rights, and that an appropriate public purpose justified overcoming the equal footing presumption:

> The extinguishment of Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such

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[23] Petitioners scarcely mention this basis for the holding of the court below. They argue instead that two independent grounds proffered by the Court of Appeals (that the treaties here involve a reservation rather than a grant of rights, and that the tribes are not claiming fee simple ownership of the tidelands) are in conflict with decisions of this Court and other Courts of Appeals. However, there is no occasion to examine those alternative grounds, for they make no difference to the outcome of this case. *Winans* controls.

> a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

198 U.S. at 384. Ever since *Winans*, the federal courts (including in the decisions ultimately upheld in *Fishing Vessel, see* 384 F. Supp. at 401) have consistently held the Equal Footing Doctrine not to affect the scope of the tribes' fishing rights, and state court decisions relying on the doctrine to that end have consistently been reversed. *See, e.g., Washington v. Tulee*, 109 P.2d 280 (Wash. 1941), *rev'd*, 315 U.S. 681 (1942).

Petitioners weakly suggest that *Winans* is not binding because this case involves shellfish rather than salmon. But they do not contest that the right of taking shellfish is part of the broader right of taking fish, and *Winans'* holding that the United States overrode the equal footing presumption so that the tribes could exercise their fishing rights is therefore squarely applicable. *Winans* admits of no distinctions in this regard between different types of fisheries, and the facts do not either. As the district court found (and as petitioners' own experts testified), the taking of salmon includes the extensive use of tidelands for "beach seines, tidal impoundment traps, stake nets and reef nets." App. 83. *See also* 384 F. Supp. at 352, 360-61, 370, 378. Indeed, as the treaties expressly provide, the fishing right even includes the right to "erect[] temporary houses for the purpose of curing" fish. These aspects of salmon fishing affect use of tidelands in ways similar to the taking of shellfish, particularly given the stringent limitations imposed below on tribal shellfishing on private tidelands.[24] The effect of the Equal

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[24] To the extent petitioners are arguing that shellfishing can be exempted from the *Winans* holding because the proviso makes the shellfishing right temporary, they are forced to ignore the findings of the courts below that the United States intended to guarantee to the tribes, and the tribes understood they were reserving, a permanent right of access to their natural shellfish beds, App. 27-28, 69-70, and that the proviso only precludes the tribes from harvesting shellfish from artificial beds created by settlers. App. 26, 77-78. For the same reason, the asserted rule of *Ward v. Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (CA10 1995), that under the equal footing

Footing Doctrine on the scope of the tribes' shellfishing rights is thus a "matter decided," and presents no basis for a grant of certiorari.

IV. The Court of Appeals Created No Conflict in Its Interpretation of the Shellfish Proviso.

A. The Court of Appeals Correctly Reviewed the Proviso Meaning *De Novo* and Subsidiary Facts for Clear Error.

Petitioners argue that the Court of Appeals did not review *de novo* the district court's conclusions regarding the meaning of the treaty shellfishing proviso and that this purported error brought it into conflict with the decisions of other circuits and of this Court. The Court of Appeals, however, expressly stated that it was conducting *de novo* review, App. 16, and its opinion bears that statement out. The court's conclusion was "that the district court's reasoned analysis of the Proviso *is correct*," App. 26 (emphasis added), not just that the analysis was not clearly erroneous. In explaining its decision, moreover, the court emphasized several points, reasoning that petitioners' interpretations of the proviso are "totally inconsistent" with the repeated promises made by the United States' negotiators to preserve the tribes' access to their fisheries, App. 27, and that petitioners' expansive reading of the proviso is flatly at odds with the "black-letter canon[]" that textual provisos are to be strictly construed. App. 28. Analysis of this sort is the hallmark of *de novo* review, and the premise of petitioners' argument therefore does not hold up.[25]

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presumption temporary and precarious treaty rights might vanish upon statehood, has no applicability to this case, even setting aside *Winans'* holding that the United States overrode the presumption in the Stevens treaties. Thus the *Repsis* court itself distinguished the Stevens treaties because of *Winans'* description of the fishing right as permanent and binding on the State. 73 F.3d at 991.

[25] Other portions of the decision below confirm that the Court of Appeals engaged in *de novo* review of the meaning of the proviso. Thus, it showed no deference in reversing the district court on the question whether the protections afforded to "citizens" by the proviso extend to the State. App. 35-36.

Petitioners attack the Court of Appeals' determination that it should "review for clear error all of the district court's findings of historical fact, including its findings regarding the treaty negotiators' intentions, [and that it would] then review *de novo* whether the district court reached the proper conclusion as to the meaning of the Shellfish Proviso given those findings." App. 16. However, none of the decisions cited by petitioners contains any statement at odds with this description of the proper standard of review – indeed, not one even discusses the standard of review appropriate in considering a district court's subsidiary "findings of historical fact." There simply is no conflict between the Court of Appeals' statement of law on this point and that found in any other cited decision.

Nor is there any error in the Court of Appeals' approach. Petitioners mistakenly assume that whenever an appellate court reviews a legal conclusion *de novo*, it should also review *de novo* all component parts of that conclusion. This is incorrect. This Court has repeatedly noted that even if a trial court conclusion is appropriately classified as one of law, an appellate court should review for clear error any subsidiary findings of historical fact.

In *Ornelas v. United States*, 517 U.S. 690 (1996), for example, this Court held that "determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal," but "hasten[ed] to point out that a reviewing court should take care . . . to review findings of historical fact only for clear error." *Id.* at 699. Similarly, in *Miller v. Fenton*, 474 U.S. 104 (1985), this Court held that while the voluntariness of a confession is a legal question subject to plenary federal review on habeas, "subsidiary factual questions, such as whether a drug has the properties of a truth serum or whether in fact the police engaged in the intimidation tactics alleged by the defendant, are entitled to [the presumption of correctness attaching to factual determinations]." *Id.* at 112 (citations omitted). Fed. R. Civ. P. 52(a) simply does not "exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). This is no less true where a factual finding serves as a predicate to a legal conclusion reviewed *de novo*.

The decision below was fully consistent with these principles. In the district court, petitioners raised a host of factual allegations regarding the knowledge and intentions of the individual treaty negotiators. They asserted, for example, that the American negotiators lacked knowledge of the shellfish industry and in drafting the proviso would have looked instead to other "frontier contexts" like mining or agriculture. App. 59. They further asserted that even if the negotiators had known about the shellfishing industry, they would have distinguished between the east and west coast industries, and that there were no uniform industry practices regarding the staking or cultivating of beds. *See, e.g.*, Growers Pet. 5, 8. They likewise asserted that the Indian negotiators had no knowledge of shellfishing industry practices, uniform or not. *Id.* at 7. These were factual allegations, and after a three-week trial the district court rejected them all on the basis of "compelling and persuasive" evidence to the contrary. App. 55. In reviewing those claims on appeal, it was entirely appropriate for the Court of Appeals to show deference to the district court's findings of fact regarding them. Rule 52(a) dictated that it do no less.

Employing a deferential standard of review with respect to subsidiary factual findings is also fully consistent with this Court's decisions. Contrary to petitioners' repeated claims, for example, this Court in *Fishing Vessel* did not engage in a plenary review of disputed facts as to the knowledge and intentions of the Stevens treaty negotiators. Rather, it cited extensively to the district court's findings on those points and conducted its treaty interpretation on the basis of those findings. *See, e.g.*, 443 U.S. at 664-69, 676-77 (citing to the district court's findings for the proposition that "[c]ontemporaneous documents make it clear that [the negotiators] *recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries*" (emphasis added)).[26]

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[26] The Alexander petitioners cite to three other decisions of this Court, Alexander Pet. 27, but again there is no tension with the decision below. None of those decisions contains any standard of review discussion. Nor do there appear to have been any disputed issues of historical fact on which the lower courts had been required to make findings.

The Growers, meanwhile, cite to four court of appeals decisions to allege a conflict. In none of those cases, however, had the respective district courts resolved any disputed issues of historical fact, so these decisions provide no guidance as to the standard of review that the circuits would employ in such a situation.[27] Moreover, highly analogous cases from those circuits demonstrate that they would take the same approach as did the court below. Thus, while petitioners insist that treaties are just like statutes, they are in fact a combination of contract and statute, and both contractual and statutory principles of interpretation are applied to them.[28] *See O'Connor v. United States*, 479 U.S. 27, 33 (1986); *Fishing Vessel*, 443 U.S. at 675.

The universal rule with respect to contracts is that, where there are disputed issues of historical fact pertinent to determining the intent of the contracting parties, the trial court's resolution of those issues is reviewed for clear error. *See, e.g., National Union Fire Ins. Co. v. Circle, Inc.*, 915 F.2d 986, 989 (CA5 1990) ("[I]f the interpretation of the contract turns on the consideration of extrinsic evidence, *such as evidence of the intent of the parties*, the standard of review is clearly erroneous." (emphasis added)); *Scarborough v. Ridgeway*, 726 F.2d 132, 135 (CA4 1984) ("There are factual questions involving the interpretation of an agreement to which the not-clearly erroneous standard applies such as the intent of the parties in employing ambiguous language where the oral and documentary

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[27] Two of the cases involved appeals from summary judgment motions. *Rainbow Navigation, Inc., v. Department of Navy*, 911 F.2d 797, 800 (CADC 1990); *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1138 (CA3 1988). The other two involved appeals from motions to quash service of process where there were no factual issues relating to treaty interpretation presented. *Tabion v. Mufti*, 73 F.3d 535, 537 (CA4 1996); *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 636-37 (CA5 1994). While the courts of appeals in several of the cases engaged in some discussion of the treaty negotiating records, there does not appear to have been any dispute as to the contents of those records.

[28] Interpreting a treaty just like a statute would not change the outcome in any event. Where there is a factual controversy as to a legislature's intent the rule remains the same: the district court's conclusion on the subject is a factual determination subject to review for clear error. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

evidence is conflicting."); *Washington Hosp. v. White*, 889 F.2d 1294 (CA3 1989) (same); *North Cent. Airlines, Inc. v. Continental Oil Co.*, 574 F.2d 582, 586-87 (CADC 1978) (same). The Ninth Circuit decision honored that rule here, and there is no conflict on which to base a grant of certiorari.

The Growers complain that deferring to subsidiary factual findings puts an appellate court in the position of automatically deferring on the ultimate issue of treaty meaning. This is not so. The Growers confuse a district court's findings regarding the treaty *negotiators'* knowledge and desires with the ultimate question of the *United States'* and the *tribes'* intent. In some cases the evidence regarding the former might be equivocal, and where the district court might draw one conclusion from that indeterminacy, an appellate court might as a legal matter draw another. In other cases, however, the findings might be so strong as to point reasonably only in one direction. This is such a case.

The district court found that the American treaty negotiators were familiar with the terms and practices of the shellfish industry as they prevailed on both the east coast and in the Washington Territory (indeed, George Gibbs' writings explicitly equate the two). App. 64-66, 71. It further found that the treating Indians had knowledge of those terms and practices by virtue of their exposure to them at Shoalwater Bay. App. 65-66. And it found that the choice of the term "beds staked or cultivated" in the shellfish proviso was no accident, but that "staked" and "cultivated" beds were widely understood to refer to beds of shellfish created by citizens where natural shellfish beds of that type did not exist. App. 77-78. These findings do strongly suggest the conclusion that the treaty prohibits tribal shellfishing only from artificial beds, but that the evidence here is so strong does not mean that a less deferential standard of review should be employed, any more than a different standard of review would be called for where a trial court determines that a confession was involuntary based on factual findings that a defendant had been tortured before confessing.

To the contrary, the weight of the evidence provides yet another reason for denying certiorari. The district court repeatedly described the proof in support of the tribes' interpretation of the proviso as "compelling and persuasive," App. 55, and the Court of Appeals was clearly of the same

view. App. 26. A ruling that the court below should engage in a plenary review of all factual matters would be highly unlikely to have any effect on the ultimate outcome.

B. The Proviso Meaning is a Unique, Factbound Issue Which the Courts Below Decided Correctly.

Petitioners argue to varying degrees that this Court should review the merits of the holdings below that the shellfish proviso prohibits tribal harvesting only from artificial shellfish beds. But that determination gives rise to no conflict and will have no impact beyond this case. There are no other Indian treaties containing language about shellfish beds.

The interpretation of the proviso language, moreover, is a heavily record-based inquiry. To reach their conclusions, the courts below engaged in a searching and detailed analysis of how the words of the proviso were understood and used at treaty times and how the parties acted subsequent to the treaties. They examined sources including industry treatises, newspaper and magazine articles, court decisions, legislation, the letters and journals of oystermen, the treaty records, and the writings of the treaty negotiators themselves, all of which consistently distinguished staked or cultivated from natural beds of shellfish, and they considered substantial expert testimony on the subject.

In short, the lower courts did as this Court instructed in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and interpreted the treaty language "in light of the common notions of the day and the assumptions of those who drafted [it]." *Id.* at 206. They addressed the arguments raised by petitioners here, finding them insufficient to overcome the "compelling" App. 55, 59, and "overwhelming[]" evidence in support of the tribes' interpretation of the proviso. App. 78.[29] Petitioners' requests that this Court engage in the same

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[29] Petitioner's claims of error do not withstand even the slightest scrutiny. For example, they claim that the courts below should have limited their analysis to dictionary definitions, even though treaty-time dictionaries do not define staked or cultivated shellfish beds, and even though their own expert conceded that the negotiators drew the proviso's terms from the shellfish industry. App. 26; D-467 at 108. *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 537 (1991) (unanimous) ("dictionary definitions may be too general for purposes of treaty

heavily record-based and factbound inquiry already conducted by the two courts below betray a fundamental misunderstanding of this Court's role and do not present a basis for certiorari.

V. This Case Presents No Opportunity To Revisit Well-Settled Law Regarding Laches.

Following an unbroken line of precedent, the courts below held that the doctrine of "laches or estoppel is not available to defeat Indian treaty rights" in a case such as this. App. 28 (quoting *Swim v. Bergland*, 696 F.2d 712, 718 (CA9 1983), and citing *Board of County Comm'rs v. United States*, 308 U.S. 343, 350-51 (1939)). The Growers and the property owners challenge this holding (the State does not raise the argument), but allege no circuit split. Certiorari should be denied on this basis alone.

Pointing to the dissent in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), the Growers claim that uncertainty exists as to whether a tribe, proceeding *by itself*, may be subject to the bar of laches. Not only has the alleged uncertainty failed to create any circuit split, but in this case the United States has sued along with the tribes for vindication of the tribes' treaty rights. It is clear beyond cavil (and petitioners make no claim to the contrary) that the

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interpretation"). They argue that the proviso prohibits tribal harvesting from "any beds," as if the overwhelming evidence as to the meaning of the "staked or cultivated" modifier does not matter. They claim that the courts below relied on a technical interpretation of east coast shellfish law, when those courts canvassed a wide variety of non-technical materials showing that the American public in general, and the treaty negotiators in particular, were familiar with the terms and practices of the shellfish industry, and that the treating Indians understood those practices by virtue of their exposure to them at Shoalwater Bay. App. 26, 59-78. They argue that the courts should have deferred to a 1905 letter from the Commissioner of Indian Affairs, even though that letter does not discuss the proviso, had its reasoning rejected by *Winans* 45 days after it was written, and is in conflict with a Commissioner's opinion written closer in time to the treaties. ER 1161-63; App. 76-77. Finally, they argue that the holdings below render the proviso duplicative of the treaties' "usual and accustomed" limitation, when in fact the tribes' usual and accustomed grounds and stations are broad areas within which there exist many locations containing only artificial shellfish beds, which the tribes could harvest were it not for the proviso.

doctrine of laches does not apply to the United States acting in its capacity as trustee for the tribes. *Nevada v. United States*, 463 U.S. 110, 141-42 (1983); *Board of County Comm'rs*, 308 U.S. at 351; *United States v. Minnesota*, 270 U.S. 181, 196 (1926); *cf. United States v. California* 507 U.S. 746, 757 (1993). The position advocated by the Growers therefore has no relevance to the outcome of this case. The writ should be denied.

VI. Petitioners' Overstated Claims of Hardship Do Not Support a Rewriting of the Treaties.

Throughout their arguments, petitioners claim that the decisions of the courts below are highly unfair and will wield a devastating impact on them. While clearly designed to engender sympathy, these claims are both factually overblown and an inappropriate basis for certiorari.

First, it is impossible to square petitioners' claims of hardship with the holdings below. Thus, while the Alexander and UPOW petitioners allege that unfettered tribal access to their properties will cause them great inconvenience and emotional harm, they nowhere acknowledge the stringent limitations that the courts below imposed on such access in response to their concerns. The tribes may harvest shellfish from private tidelands only five days out of every year (with slight increases for large properties), and they may do so only after having given the owner at least a month's notice and after having conducted expensive surveys definitively quantifying the natural shellfish presence on those tidelands. App. 37-40, 126-27, 146. As a practical matter, then, the tribes who could once resort to their fisheries at will may now do so only under the most restrictive of conditions.

The Growers, meanwhile, complain that the decisions below will rob them of the "fruits of their labor." This is pure hyperbole. Under the Court of Appeals' decision the growers will never lose a single clam or oyster produced by dint of their effort or investment. The holding below unequivocally limits the tribes only to a share of those shellfish that would naturally exist without the growers' labor. App. 33-35.

The impact on the growers from having to share nature's shellfish has not been finally determined, as the Ninth

Circuit remanded to the district court the question of the natural productivity of the growers' beds. The tribes have already conceded, however, that virtually all of the growers' oyster and mussel beds are artificial, App. 106, exempting approximately 66% of the total value of the shellfish commercially harvested from Washington tidelands from any tribal share. PL-988, Tbl. 50. The remaining 34% of the commercial harvest is largely in the form of clams, and here again it is clear that much of the growers' production results from their efforts. The total tribal share of the natural production will therefore likely be very small compared to the growers' overall harvest.

Petitioners, of course, make no mention of the hardship and poverty suffered by the tribes because of years of exclusion from their fisheries. Even more fundamentally, petitioners' allegations of harm cannot serve as a basis for interpreting what the treaties mean. It is a cardinal rule that "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). *See also Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945). This rule is often applied to the detriment of Indian tribes; it applies with equal force when non-Indians seek to rewrite treaty terms to avoid a claimed injustice. This Court is simply not in the business of recrafting treaty promises that only Congress may amend, and petitioners' overstated claims of harm therefore do not create a basis for certiorari.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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MOTION FILED
MAR 2 1998

Nos. 98-1026; 98-1028; 98-1039; & 98-1052

In the

Supreme Court of the United States

October Term, 1998

STATE OF WASHINGTON,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

(Additional parties listed on inside front cover.)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS STATE OF WASHINGTON, 26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS, PUGET SOUND SHELLFISH GROWERS, LARRY B. AND SHIRLEE ALEXANDER, AND WILLIAM AND CHARMOND ADKINS

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PUGET SOUND SHELLFISH GROWERS,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

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26 TIDELAND AND UPLAND
PRIVATE PROPERTY OWNERS,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents

LARRY B. AND SHIRLEE ALEXANDER, *et al.*, and
WILLIAM AND CHARMOND ADKINS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS STATE OF WASHINGTON, 26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS, PUGET SOUND SHELLFISH GROWERS, LARRY B. AND SHIRLEE ALEXANDER, AND WILLIAM AND CHARMOND ADKINS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves to file the attached brief amicus curiae.[1] Consent to file this brief has been granted by counsel for the United States, the Jamestown, Lower Elwah and Port Gamble Bands of S'Klallams, Nisqually, Nooksack, Skokomish, Squaxin Island, Upper Skagit, Sauk-Suiattle, and Stillaguamish Tribes, the Suquamish Tribe, the Makah Tribe, the Quileute Tribe, Puget Sound Shellfish Growers, Petitioners Adkins, 26 Tideland and Upland Private Property Owners (UPOW), Petitioners Alexander, the Yakama Indian Nation, and the State of Washington. The letters of consent received have been lodged with the Clerk of this Court. Requests for consent to file the amicus curiae brief were made to the other parties, but as of the date of filing this brief written responses from them have not been received.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation has participated in numerous cases before the United States Supreme Court involving the protection of private property rights. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659 (1997), and PLF participated as Amicus Curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), *First English Evangelical*

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae affirms that no counsel for any party in this case authored this brief in whole or in part and, furthermore, that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to name but a few. PLF participated as Amicus Curiae in this case both in the proceedings before the district court, as well as on appeal in the Ninth Circuit, and also filed an amicus brief in this Court in connection with another case interpreting the treaties at issue here, *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, *modified sub nom.*, *United States v. State of Washington*, 444 U.S. 816 (1979).

Amicus seeks to augment Petitioners' arguments by arguing that this Court should decide the important question of whether the claims of the Tribes should be barred by the doctrine of laches, at least as to the right to take shellfish in private tidelands.[2] Not only do the equities weigh heavily in favor of thousands of private landowners, but previous decisions of this Court on laches do not address the unique circumstances of this case. Moreover, PLF is concerned that the Ninth Circuit's decision ignores the serious harm its decision will work on innocent property owners.

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[2] Both the Puget Sound Shellfish Growers and the Alexander/Adkins Petitioners have raised the issue of the application of laches in their petitions. *Puget Sound Shellfish Growers v. United States*, No. 98-1028, Petition at i; *Larry B. and Shirlee Alexander and William and Charmond Adkins v. United States*, No. 98-1052, Petition at 27.

For the foregoing reasons, PLF requests this Court to grant its motion to file the attached amicus curiae brief.

DATED: March, 1999.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae Pacific Legal Foundation (PLF) is set forth in the preceding motion.

INTRODUCTION

In this case, the Ninth Circuit has determined that a number of Indian tribes in Western Washington (Tribes) have extensive rights to cross privately owned uplands and to enter and harvest shellfish from privately-owned tidelands. The Ninth Circuit determined the Tribes reserved these rights under a series of treaties entered into by the Tribes and the United States in 1854 and 1855 despite the Indian tribes having asserted no claim for 135 years that they possessed such rights, and despite a proviso in the treaties that the Indians would not have any right to take shellfish from "any beds staked or cultivated by citizens."

The decision of the Ninth Circuit substantially and adversely affects private property rights in the State of Washington. As noted by Judge Beezer in his concurrence, "[p]roperty rights, which have been undisturbed for generations, are encumbered by our decision today." *United States v. State of Washington*, 157 F.3d 630, 659 (9th Cir. 1998), Appendix (App.) at 46 (*Shellfish III*).

Despite the generations-long delay in making any claim, and despite the severe disruption of long-held property rights, the Ninth Circuit held that under this Court's precedents, the doctrine of laches could not be applied to bar any tribal claims. However, this Court has never held that the doctrine of laches is unavailable as a defense to the assertion of all Indian treaty claims. In fact, this Court expressly declined to address the question in *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) (*Oneida)*, although a strong dissent by four Justices argued that the doctrine of laches should be available as a defense where an Indian tribe had waited 175 years before bringing suit to avoid a conveyance of tribal land for valuable consideration.

Whether the doctrine of laches should be applied to bar long unasserted Indian treaty claims, especially where those are claims of reserved rights to fish, hunt, or harvest, is a question of nationwide importance. In recent years, various tribes around the country have sought to reassert claims to usufructuary rights in public and private rights and private property. Indeed, a case involving reassertion of Indian hunting and fishing rights under an 1837 treaty between the United States and the Chippewa is presently pending before this Court.[1] The Courts should have the power to apply the doctrine in appropriate circumstances, especially where, as here, the Tribes failed to assert their claims for an extended period and the claimed rights severely disrupt long-held property rights. Accordingly, the Court should grant the petitions to answer the important question it left open in *Oneida*.

STATEMENT OF THE CASE

A. Summary of Proceedings Below

In 1970, the United States and the Tribes filed a complaint against the State of Washington seeking a declaratory judgment interpreting the Tribes' treaty rights to fish for salmon and steelhead. The district court retained continuing jurisdiction of future unresolved issues arising out of the fishing provisions of the treaties. *United States v. State of Washington*, 384 F. Supp. 312, 327-28 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

On May 19, 1989, 16 of the Tribes began the subproceeding now before this Court by filing a "Request for Determination re: Shellfish." The Tribes' claim arises out of provisions of five treaties (Treaties) negotiated with the United States in 1854 and

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[1] *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, No. 97-1337; *County of Aitkin v. Mille Lacs Band of Chippewa Indians* No. 97-1356, and *Thompson v. Mille Lacs Band of Chippewa Indians*, No. 97-1357.

1855.[2] Each of the Treaties contains substantially similar language stating that the Indians would continue to possess

> [t]he right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, that they shall not take shell fish from any beds staked or cultivated by citizens.

Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, Art. III, App. at 170. On the basis of the language above, the Tribes claimed their fishing rights included a treaty right to harvest shellfish from all tidelands in Western Washington, including private and state owned tidelands, together with a right of access over upland properties to reach such tidelands. The district court initially determined that, under the Treaties, the Tribes were entitled to 50% of the shellfish harvest in Washington waters. *United States v. State of Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994) (*Shellfish I*).

The district court then conducted an implementation trial. In its resulting decision, the court noted that

> [t]he Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property. Indeed, many of these Growers and

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[2] Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, App at 169 ; Treaty of Point Elliott, January 22 1855, 12 Stat. 927, App. at 177; Treaty of Point No Point, January 26, 1855, 12 Stat. 933, App. at 187 ; Treaty with the Makah, January 31, 1855, 12 Stat. 939, App. at 195; and Treaty of Olympia, July 1, 1855, 12 Stat. 971, App. at 203. These treaties are also collectively referred to as the "Stevens Treaties," territorial Governor Isaac Stevens having negotiated the treaties on behalf of the United States.

> Owners purchased their land at or before the turn of the century, and they reasonably believed the land to be free of encumbrances and servitudes. Their belief was reinforced by the Tribes' failure to formally assert the Treaty right until over 100 years after the Stevens Treaties were signed.

United States v. State of Washington, 898 F. Supp. 1453, 1457 (W.D. Wash. 1995) (*Shellfish II*), App. at 97.

The decisions of the district court were appealed. Like the district court, the Ninth Circuit recognized that "the equities do weigh heavily in favor of the Growers' argument—the Tribes waited 135 years to assert their shellfishing rights." *United States v. State of Washington*, 157 F.3d at 649, App. at 28. Nevertheless, the Ninth Circuit rejected arguments that the equitable doctrine of laches should be applied to defeat the Tribes' claim to shellfish. The Ninth Circuit, while recognizing "the enormous impact our decision will have on the thousands of homeowners, Tribal members, and commercial fishermen in the Puget Sound region," 157 F.3d at 657, App. at 42, still held that the Tribes have Treaty rights to take 50% of shellfish on all Washington tidelands, including those in private ownership. *Id.* at 646-47, App. at 45-48.

On private tidelands, the Tribes are authorized to enter to conduct surveys of the claims and then may enter those private lands and take 50% of the clams and oysters, subject to "time, place and manner" restrictions. A limited exception is made for artificially cultivated beds. *Id.* at 653, App. at 38.

B. History of the Treaties and of the Shellfishing Industry in Washington

As noted by this Court in *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), the United States entered into the Treaties "[t]o extinguish the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia

River in what is now the State of Washington." *Id.* at 661. As a result, "[t]he Indians relinquished their interest in most of the Territory in exchange for monetary payments." *Id.* at 662.

In return for the absolute conveyance of their aboriginal title to the United States, the Tribes received annual payments from the United States. Treaty of Medicine Creek, 10 Stat. 1132 App. at 169, Art. 4; App. at 171. The Indians also reserved certain rights including the right to hunt, fish, and gather as set forth above.

As demonstrated by the record below, Washington has had a long history of treating tidelands and their shellfish resources as private property, which was understood both by the Indians and by the white settlers. As noted in an earlier case interpreting the Treaties, the Indians traditionally recognized shellfish as property which could be exclusively possessed:

> The record establishes that the Indians recognized exclusive property interests in land and in sedentary resources. However, the Indians viewed migratory fish and animals differently from stationary ones. The right to take fish existed when and only when, the fish were within or passing through a tribe's particular territory. . . . Indians considered shellfish, as sedentary creatures, to be the exclusive province of the tribe within whose territory they were located.

United States v. State of Washington, 506 F. Supp. 187, 199-200 (W.D. Wash. 1980), *aff'd in part, rev'd in part*, 694 F.2d 1374 (9th Cir. 1982), *on rehearing*, 759 F.2d 1353 (9th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985). The Indians also understood the settlers' concept of private property as the right to exclude others from land and the resources on it. Exhibit D-064 at 345-46 (typescript of "Records of the Proceedings of the Commission to Hold Treaties with the Indian Tribes in Washington Territory and the Blackfoot Country," from December 7, 1854 - June 11, 1855, by E.G. Swindell, Jr. (Los Angeles, CA 1942)); Exhibit D-473 at 50-51 (Dr. Daniel

Boxberger, *The Ethnohistory of Western Washington Indians in the Nineteenth Century with Reference to Shellfish Use and Control* (May 1993)).

After ratification of the Treaties, various settlements including the Cities of Seattle, Tacoma, Bellingham, and Port Townsend grew on tidelands containing shellfish beds which had been used by local tribes. Exhibit D-470 at 19-28. In 1864, the territorial legislature granted commercial shellfish growers exclusive rights in natural oyster beds in southern Puget Sound. App. at 63 n.11; Transcript at 1936-37.

In 1879, the legislature gave citizens the right to claim up to ten acres of any newly discovered oyster beds. Session Laws of the Territory of Washington 118-20 (1879). Starting in 1889, the legislature authorized the sale of tidelands "for commerce, trade or business." Washington Laws 1895, ch. 178, §§ 54 and 62; Washington Laws 1889-90 at 431. And in 1891, the Washington Supreme Court recognized the state's "full power to dispose of [tidelands] subject to no restrictions save those imposed upon the legislature by the constitution." *Eisenbach v. Hatfield*, 2 Wash. 236, 245, 26 P. 539 (1891).

The Tribes understood that they permanently lost access to shellfish beds when settlers exercised their right to stake or cultivate such beds. Transcript at 431-34. Indeed, prior to this case, in the litigation involving the Tribe's right to take anadromous fish, the Tribes and their experts agreed that their rights to shellfish were subject to termination when staked or cultivated. One of the Tribes' expert witnesses, Dr. Barbara Lane, had testified that the Indians understood they could lose a "treasured shellfish bed" because settlers could stake or cultivate such beds "anywhere." *See* Puget Sound Shellfish Growers' Excerpt of Record (GER) at 17. And the Suquamish Tribe admitted in its brief to the Ninth Circuit that "[u]nlike the in common shellfish right, the in common salmon right is not defeasible by staking or cultivating." GER at 2.

In 1905, the federal Commissioner of Indian Affairs ruled that the Treaty of Point Elliott did not prevent the State of Washington from granting a lessee of its tidelands the right to exclude Indians from taking clams, even though "the clam beds in question have never been cultivated." App. at 212. In 1908, the Washington Supreme Court similarly ruled that these lessees could enjoin all persons including Indians from taking clams from the leased tidelands because the clams "live, not merely upon, but actually, within, the land [and] . . . in a very material sense, belong with the land." *Sequim Bay Canning Company v. Bugge*, 49 Wash. 127, 131, 94 P. 922 (1908).

Today, there are thousands of owners of uplands who also own the adjacent tidelands. There are approximately 150,000 private titles potentially affected by the Ninth Circuit's decision. Transcript of Proceedings, May 12, 1995, at 838, App. at 14.

The allocation of 50% of the harvest to the Tribes has a severe impact on private tideland property. A real estate appraiser with expertise in waterfront properties concluded that property values would be diminished by as much as 40% as a result. Transcript of Proceedings, Vol. 11, May 2, 1994, at 2158-66. Additionally, the allocation makes profitable shellfish harvest unfeasible for small shellfish growers. Transcript of Proceedings, May 12, 1995, at 848.

The decision potentially could also have a devastating impact on Washington's commercial shellfish industry in general. As noted by Judge Beezer in his concurrence:

> The burden imposed by our opinion cannot be overstated. The record in this case makes abundantly clear that since treaty times a vibrant shellfish industry has developed in the State of Washington along the saltwater beaches of the Pacific Ocean and along tidelands adjoining the inland waters of Puget Sound.
>
> . . .

> The tension between grower and Indian under treaty provisions is clear. One will not grow shellfish on lands bearing natural shellfish to provide subsistence to the other without compensation for the damage occurring to the cultivated shellfish.

Shellfish III, 157 F.3d at 658-59, App. at 44-45.

SUMMARY OF THE ARGUMENT

The Court should grant the petitions to address the undecided, but important question whether the doctrine of laches is applicable to bar long-unasserted Indian treaty rights to harvest shellfish from private tidelands. Thousands of innocent private property owners will suffer serious harm if the Tribes, after 135 years of inaction, are allowed to reassert shellfishing rights.

In holding that the doctrine of laches was unavailable to bar such claims, the Ninth Circuit relied upon its prior decision in *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983), which in turn rested on this Court's decision in *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343 (1939) (*County Commissioners*). *County Commissioners*, however, as well as other decisions of the Court holding that the doctrine of laches would not apply to bar Indian claims, can be readily distinguished from the situation here. Those decisions involved specific rights, immunities, or restrictions imposed by the United States upon tribes or tribal members, rather than reserved usufructuary rights.

Application of laches to such usufructuary rights is an important question raised by the decision below. Not only has it not been addressed by the Court, but it has significant nationwide importance, given the potential for reassertion of long-dormant usufructuary rights purportedly reserved in many other Indian treaties.

ARGUMENT

I

THE COURT SHOULD GRANT THE PETITIONS TO DECIDE FOR THE FIRST TIME THE IMPORTANT QUESTION OF WHETHER THE DOCTRINE OF LACHES IS APPLICABLE TO BAR OR LIMIT THE TRIBES' 135 YEAR DORMANT CLAIM TO TAKE SHELLFISH FROM PRIVATE TIDELANDS

This case raises an important question never before addressed by the Court. It is time to do so. In the past the Court has recognized that laches cannot apply where federal statute or treaty provisions specifically prohibit an action with regard to Indian lands, but this case raises a completely new question.

Nevertheless, the Ninth Circuit held that the doctrine of laches was not available to bar or limit the Tribes' claims in this case. While that court conceded that "the equities do weigh heavily in favor" of application of the doctrine because the Tribes waited 135 years to assert their shellfishing rights, the court did not consider application of the doctrine because its prior opinion in *Swim v. Bergland*, 696 F.2d at 718, had held that "[l]aches or estoppel is not available to defeat Indian treaty rights." *Shellfish III*, 157 F.3d at 649, App. at 28. The holding in *Swim* ostensibly rested on this Court's opinion in *Board of Commissioners of Jackson County v. United States*, 308 U.S. at 350-51.

An examination of *County Commissioners* demonstrates that this Court's holdings in that case are based on a very different situation of fact and law, one easily distinguishable from the present case. *County Commissioners*, as well as similar Supreme Court cases, all deal with the situation where specific rights, immunities, or restrictions have been *granted or imposed by the United States* upon tribes or tribal members. Thus in *County Commissioners*, what was at issue was a specific provision in the treaty with the Pottawatomies in which the United States provided that lands held in trust by the United

States for these Indians would be exempt from state taxation. 308 U.S. at 348. Thus, this Court could say with authority that "state notions of laches and state statutes of limitations have no applicability," and "the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments." *Id.* at 351.

The same analysis holds true in other opinions of this Court where the defense of laches was determined to be inapplicable. For example, in *Ewert v. Bluejacket*, 259 U.S. 129 (1922), the heirs of Charles Bluejacket, a full-blood Quapaw Indian, sought to have the courts void a deed by him to Paul Ewert. At the time of the challenged conveyance, Ewert was a special assistant to the Attorney General of the United States with the obligation to assist in the institution and prosecution of suits to set aside deeds to certain allotments in the Quapaw Indian Agency. *Id.* at 134. At the time of the conveyance a federal statute provided that

> [n]o person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States.

Id. at 135. This Court upheld the lower court's voiding of the deed because of the specific statutory prohibition and further held that the doctrine of laches was not applicable where there is a specific federal statutory prohibition on alienation of Indian title:

> [T]he equitable doctrine of laches, developed and designed to protect goodfaith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions.

Id. at 138.

Similarly, in *Oneida* it was again Indian title which had been conveyed despite express federal statutory prohibitions. The

Oneida Indian Nation sought to recover damages for the use and occupation of 100,000 acres of its tribal lands which it had conveyed to the State of New York in 1795. The conveyance occurred despite the provisions of the federal Trade and Intercourse Act of 1793, which provided in pertinent part that

> no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution . . . [and] in the presence, and with the approbation of the commissioner or commissioners of the United States.

1 Stat. 330, § 8 (1793).

The Court stated that it would not consider application of the equitable doctrine of laches for two reasons. First, *Oneida* had been brought as an action at law for damages. Second, like *Ewert*, it involved questions of conveyance and extinguishment of Indian title in violation of specific federal statutory law. 470 U.S. at 244 n.16. Nevertheless, the four dissenting Justices in *Oneida* believed that where claims had been allowed to languish for 180 years, a federal common law concept of laches should be applicable to bar even claims of improper alienation of Indian title.

Unlike *Oneida*, the case before this Court has been maintained as an equitable action in which the Tribes have sought to enjoin the alleged interference with their reserved fishing rights under the Treaties. It also does not involve questions of improper alienation of Indian title, because that title was validly conveyed to the United States under the Treaties. Each one of the Treaties expressly provides that the Tribes shall

> *cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them.*

Treaty of Medicine Creek, 10 Stat. 1132, App. at 169. Instead, this case involves the equitable interpretation and enforcement of the Tribes' reserved shellfishing rights. Thus, the situation is the paradigm of issue left open in *Oneida* and is in need of resolution by this Court.

In the present case, not only do we have a lapse of 135 years before the Tribes took any action to claim fishing rights in private shellfish lands, the interest they seek to vindicate is much more ephemeral than those previously at issue in the Court's jurisdiction.[3] Further, prior to this litigation the Tribes had never engaged in any action that would have put a reasonable person on notice of their claim. This Court has defined laches as follows:

> [T]he question of laches turns not simply upon the number of years which have elapsed between the accruing of . . .rights, whatever they were, and . . . assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper

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[3] In other words, in cases like *County Commissioners*, *Ewert*, and *Oneida*, the existence and extent of the right or prohibition can easily be determined by review of the applicable federal statutory provision. Here, as a practical matter, one can only be put on notice of the claimed right by actual and repeated exercise by the Tribes, which did not occur. Also, unlike Indian title, fishing and hunting rights on ceded land are not part of a Tribe's reserved sovereignty, but instead are lesser rights subject to regulation by the States. *Cf.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942) at 335.

> forum; *that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned*; and that because of the changing condition or relations during this period of delay it would be an injustice to the latter to permit him now to assert them.

Galliher v. Cadwell, 145 U.S. 368, 371-72 (1892) (emphasis added).

Whether Indian rights have effectively been abandoned is an important question that this Court has considered in a number of its cases. In *Mitchel v. United States*, 34 U.S. (9 Pet). 711, 746 (1835), this Court stated:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way, and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their right became extinct.

Similarly, in *Williams v. City of Chicago*, 242 U.S. 434, 437 (1917), this Court stated:

> If in any view [the Pottawatomie Nation] ever held possession of the property here in question, we know historically that this was abandoned long ago and that for more than a half century [the tribe] has not even pretended to occupy either the shores or waters of Lake Michigan within the confines of Illinois.

This Court has also engaged in a similar analysis when previously construing fishing rights under the Stevens Treaties. In *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, the Court noted that a Tribe's right to an allocation of anadromous fish could be

reduced if "it should find other sources of support that lead it to abandon its fisheries." *Id.* at 687. And in *Seufert Brothers Company v. United States*, 249 U.S. 194 (1919), this Court emphasized the fact that the tribe had continuously asserted a right of access to a traditional fishing area. There, the United States sought to restrain interference with Yakima Nation tribal members' rights to fish in a specific locality on the Oregon bank of the Columbia River, and the right to get access to this area through private property. This Court noted that "[d]uring all the years since the treaty was signed [the Indians] have been accustomed habitually to resort for fishing to the [Oregon side of the river]." *Id.* at 198. In upholding the lower court's ruling for the Indians, this Court stressed that the only "servitude" that existed was where there had been a "habitual" and "open and notorious" use of the property by the Indians:

> The suggestion, so impressively urged, that this construction "imposes a servitude upon the Oregon soil," is not alarming from the point of view of the public, and private owners not only had notice of these Indian customary rights by the reservation of them in the treaty, *but the "servitude" is one existing only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year that any person, not negligently or wilfully blind to the conditions of the property he was purchasing, must have known of them.*

Id. at 199 (emphasis added).

Like *Seufert*, the Ninth Circuit's decision here has effectively created a servitude on privately owned land but, unlike this Court in *Seufert*, the Ninth Circuit failed to adequately address the history of use which would indicate whether the rights had been abandoned by the Tribes, much less whether there had been the "habitual," "customary," and "open and notorious" use since treaty time required by *Seufert*. As a result, a floating easement, uncertain in extent and nature, now exists on tens of

thousands of acres of private property, a servitude that no private landowner could have known existed prior to the lower courts' rulings.[4]

Additionally, the Tribes took no action for 135 years to assert a claim to these rights, despite longstanding knowledge that both federal and state officials, as well as the state courts, had declared that no such rights existed. The Tribes' delay is further compounded by the fact that they may well have had a remedy at law for compensation from the United States, either under the Indian Claims Commission Act (ICCA), 25 U.S.C. § 70 for claims arising up to 1946 or under 28 U.S.C. § 1505 for post-1946 claims.[5] For example, many of the actions complained of by the Tribes actually were implemented by acts of the territorial legislature permitting private claims and ownership of natural shellfish beds. In 1905, the federal Commission of Indian Affairs declared that the State of Washington had the right to exclude Indians from taking clams from tidelands. The ICCA applies to all treaty claims including fishing and hunting rights. *See Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1464-67 (10th Cir. 1987).

PLF submits that given the long inaction of the Tribes which signaled abandonment of any rights, the reasonable reliance of thousands of private property owners who have purchased, occupied, and used tidelands for generations, and the serious

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[4] Also *cf.* Solicitor General Hoyt's statement in *United States v. Winans*, 198 U.S. 371 (1905), that "[w]e are not seeking to impress a broad and vague servitude on all patented lands along the Columbia, but only a clear and limited one on this particular small tract." 198 U.S. at 373.

[5] The United States Court of Federal Claims shall have jurisdiction of any claims "against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians . . . whenever such claim is one arising under the Constitution, laws or treaties of the United States or Executive orders of the President." 28 U.S.C. § 1505.

damage that will be done to private property rights, this case presents the appropriate situation for this Court to address whether the doctrine of laches should be applied.

II

THE COURT SHOULD GRANT THE PETITIONS BECAUSE APPLICATION OF LACHES IS ESPECIALLY PERTINENT WHERE THE TRIBES' PAST AND PRESENT DECISIONS NOT TO ASSERT THEIR CLAIMS AGAINST THE UNITED STATES NOW WORK UNFAIRLY TO SHIFT LIABILITY FOR SUCH CLAIMS FROM THE UNITED STATES TO INNOCENT PRIVATE LAND OWNERS

This case raises a serious question that should be addressed by this Court. Should laches apply to tribal claims that seek a remedy not against culpable governmental entities, but instead against innocent private property owners? In this case, both the district court and the Ninth Circuit recognized that thousands of private property owners are the innocent parties who will suffer the brunt of the impact of the courts' decision. The district court specifically found that

> Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property. Indeed, many of these Growers and Owners purchased their land at or before the turn of the century, and they reasonably believed the land to be free of encumbrances and servitudes.

Shellfish II, 898 F. Supp. at 1457. The reasonable belief of private property owners was reinforced by the Tribes' long-standing failure to take any action to assert a claim to shellfish on this land: "Their belief was reinforced by the Tribes' failure to formally assert the Treaty right until over 100 years after the Stevens Treaties were signed." *Id.* The district court found that fault, if any, for creation of the situation lay with the State of Washington and the United States, not with private owners:

"Fault for creating this controversy lies squarely with the State of Washington and the United States, for selling the tidelands and not objecting to the sale, respectively." *Id.* at 1459.

Nevertheless, the United States appears in this action as a Plaintiff, ostensibly acting on behalf of the Tribes. The United States has taken this position despite the fact that it also possesses tidelands suitable for shellfishing,[6] and despite the fact the district court determined that it, and not private landowners, was in part responsible for any violation of the Tribes' treaty shellfishing rights. *Shellfish II*, 898 F. Supp. at 1459. Moreover, the United States only supported the Tribes' claim once it was clarified that the Tribes were not including federal tidelands.[7]

Alignment of the United States as a Plaintiff, rather than as a Defendant, raises important issues relevant to the laches question. As noted above, the Tribes possessed the right to assert claims for monetary compensation against the United States under the ICCA, as well as under 28 U.S.C. § 1505. The selective decision by the Tribes not to assert claims against the United States obviated the need for the United States to raise an obvious federal defense to the assertion of such claims: that the Tribes' remedy is not a suit for specific enforcement but, rather, an action for compensation either before the Indian Claims

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[6] PLF notes that if shellfishing claims are barred as to private lands, that does not necessarily mean that all shellfishing rights under the Treaties cease. At the present time, 53% of the tidelands are privately owned and 47% are either present reservation lands or public lands within the control of either the State of Washington or the United States. Exhibit US-181.

[7] As noted in the petition of 26 Tideland and Upland Private Property Owners (UPOW), the Tribes initially asserted their claim against all private and public tidelands. Later, after the United States supported the Tribes' claim, the Tribes clarified that they were not including federal tideland ownership within their claim. UPOW petition at 5-6.

Commission under the ICCA or a suit in the Court of Federal Claims under 28 U.S.C. § 1505.

Second, the decision by the Tribes not to assert claims against the United States and the United States' corresponding support of the Tribes in this action served to shift the burden to private landowners to "compensate" the Tribes for any wrongdoing of the United States. In other words, not only has the question of federal monetary compensation been avoided, under the lower courts' decisions, the potential obligation of the United States to make all of its own tidelands available for tribal shellfishing has now been transferred to, and is borne instead by, private landowners as well as the State of Washington.

The resulting situation is much akin to the "off-budget" transfers questioned by Justice Scalia in *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988). In that case, Justice Scalia noted there would be little public support if a measure requiring landlords to subsidize "hardship tenants" were instead structured to provide monetary subsidies to those tenants from public funds. The unfairness is even more evident here. It is impossible to conceive that Congress through legislation could dictate the result the United States and the Tribes have achieved indirectly here: requiring private shoreline owners to open their lands and make their shellfish resources available to the Tribes in order to preserve the federal government's own tideland property from those same treaty obligations. Such a direct measure also would pose serious constitutional questions since it would be an obvious example of "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The question of whether to apply laches is especially pertinent under these circumstances. Accordingly, the Court should grant the petitions.

III

WHETHER LACHES IS AVAILABLE TO BAR LONG-UNASSERTED TRIBAL USUFRUCTUARY RIGHTS IS A QUESTION OF NATIONWIDE IMPORTANCE

While they vary as to their specific provisions, many Indian treaties provide that the Indians reserve certain hunting and fishing rights in lands ceded to the United States. *See, e.g.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942) at 285 n.171 (listing such treaties entered into between 1789 and 1864). In many cases these rights have not been exercised, especially where such lands were subsequently acquired and utilized by settlers and have been treated as private property for generations. The loss of property rights suffered by innocent Puget Sound property owners as a result of a retroactive treaty interpretation by the courts below creates a precedent that could be used to cause similar suffering by property owners in many other parts of the country as well.

The Court has long recognized that claims, especially those affecting property rights, should be asserted within a reasonable time. "The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles." *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 472 (1831). While "it is well established that treaties should be construed liberally in favor of the Indians," *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943), this should not work to reward those who have slept on their treaty rights.

A question of nationwide importance has accordingly been raised by the petitions. The question is whether laches is available to bar long-unasserted tribal usufructuary rights that if upheld will cause innocent landowners to lose significant private property rights. The Court should grant the petitions and address this question.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions to consider the laches issue left open in *Oneida*. The need for such consideration here is great. The damage that will be done to private property rights if the Ninth Circuit's decision is allowed to stand will be tremendous. Rights which thousands of property owners for generations believed in good faith they possessed will be nullified, including the right to exclude others traditionally held by this Court to be "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 433 (1982).

DATED: March, 1999.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 1 1999
OFFICE OF THE CLERK

(5) (4) (4) (4)

No. 98-1026, 98-1028, 98-1039, 98-1052

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

STATE OF WASHINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF INNER SOUND CRAB ASSOCIATION, JOE VERDOES, AND WASHINGTON DUNGENESS CRAB FISHERMEN'S ASSOCIATION, TOM KELLEY, IN SUPPORT OF PETITIONER, STATE OF WASHINGTON

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CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or affiliates to these Associations which have issued shares to the public.

The Inner Sound Crab Association is a non-profit Washington corporation. Its membership includes major elements of the commercial dungeness crab fishing industry that concentrates its fishing in the waters of Puget Sound.

The Washington Dungeness Crab Fishermen's Association is also a non-profit Washington corporation. Its membership includes major elements of the commercial dungeness crab fishing industry off the coast of Washington.

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BRIEF AMICI CURIAE OF INNER SOUND CRAB ASSOCIATION, JOE VERDOES, AND WASHINGTON DUNGENESS CRAB FISHERMEN'S ASSOCIATION, TOM KELLEY, IN SUPPORT OF PETITIONER, STATE OF WASHINGTON

INTEREST OF AMICI CURIAE [1]

> In twenty-five years, the sea changes, in terms of what creatures are scarce or plentiful in Puget Sound, the technology changes, in terms of how practical it is to fish for one or another creature, and the market changes, in terms of how interested Japanese or American consumers may be in the catch. The eleven-year old child of a halibut fisherman when this lawsuit started in 1970 may now be the thirty-six year old skipper of a crab boat, with a different kind of participation in the industry and different economic interests than his father's. Where a federal district court makes itself a permanent regulatory agency for an industry, it ill behooves the judiciary to exclude people who earn their living in the industry from being heard on how they shall be regulated, on the ground that they did not complain about other decisions at an earlier time.

United States v. Washington, 86 F.3d 1499, 1508 (9th Cir. 1996) (Kleinfeld, J., dissenting). *See Amici* Add. at 3a-4a.

A. The Inner Sound Crab Association (ISCA) (Puget Sound).

ISCA is a non-profit Washington corporation. Mr. Joe Verdoes is the elected President of the Association. ISCA includes, in its membership, all major elements of the

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[1] Pursuant to S. Ct. Rule 37.6, this brief was authored, in its entirety, by counsel for *Amici Curiae*, Inner Sound Crab Association and Washington Dungeness Crab Fishermen's Association. No other person or entity other than *Amici Curiae* made any monetary contribution to the preparation or submission of this brief.

The written consent of all parties is submitted with this brief.

non-treaty commercial dungeness crab fishing industry within Puget Sound. There are approximately 220 persons holding commercial crab limited entry licenses for these areas. The Crab License Moratorium Law, RCW 75.30.130, prohibits new recruitment to the industry. The majority of the active fishermen were members of ISCA before this litigation. Some Indian crab fishers also participated in the fishery under more or less uniform regulations. Because limited entry permits for the fishery were transferrable, those permits had real and substantial value. In light of the recent rulings, the income generated under each permit has declined significantly.

ISCA members have small family businesses. Fishermen make a significant investment to participate in the Puget Sound commercial dungeness crab fishery. Most have invested tens of thousands of dollars in their vessels, necessary crab pots and related gear (some more than $100,000). In the 1990's, their livelihood and that of their families and their small coastal communities has depended largely upon this fishery, particularly because of the fate of salmon in the Washington area.[2]

The dungeness crab season for licensed commercial fishermen ordinarily runs from October 1 through April 15 in Puget Sound. In Puget Sound, the majority of dungeness crab molt in late spring. Molting crab are subject to increased mortality if handled before their shells harden in late summer (as is now the case for treaty fishers who target the crab during the molting season). The fall opening is scheduled to assure that the crabs are filled with meat and have attained their highest market-

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2 Many coastal fishing communities are, by definition, single industry communities. As a result, the burdens imposed by this case will not be shared by all citizens of the State. Instead, they are borne by association members (and other fishers) and these small communities. As a practical matter, they have no real voice in the political process.

ability and resistance to handling mortality before the season.

A majority of the Puget Sound dungeness crab are taken in the first few weeks of the season. This crab fishery, because of its local resident nature, requires a management plan that makes uniform regulation its guiding principle.[3]

Treaty fishers in Puget Sound dispute established biology with respect to crab molting mortality. Accordingly, the treaty season is all year long (and exclusive in some areas). This "co-management" has resulted in a decrease in ISCA income of approximately sixty percent (60%) per permit.

B. Washington Dungeness Crab Fishermen's Association (WDCFA) (Coastal and Adjacent Waters of Pacific Ocean).

WDCFA is also a non-profit Washington corporation. Mr. Tom Kelley is the President of the Association. WDCFA includes all major elements of the commercial dungeness crab fishing industry off the coast of Washington. There are approximately 240 non-Indian commercial crab fishermen harvesting dungeness crab in this ocean area. A substantial number of these active fishermen are members of WDCFA. In 1995, the State of Washington passed legislation limiting entry into the coastal dungeness crab fishery effective January 1, 1995. RCW 75.30.350. The limited entry licenses are transferrable and have a market value. Although only few transfers occur, the value of the license is substantial. In light of the ruling of the Ninth Circuit, license values have declined. Fishing seasons have faced increasing restrictions.

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[3] The marketing of a substantial amount of undersized crab has recently been documented and confirmed in the State of Hawaii and in the State of Washington. Everyone agrees that such a practice will rapidly destroy the crab fishery. To date, non-treaty crabbers have not been implicated in the investigation.

As in ISCA, most WDCFA members have participated in the commercial crab fishery off the coast of Washington for decades. Many have participated in the fishery for generations. Their livelihoods have also become particularly dependent upon this fishery because of the fate of salmon in the Washington area. Moreover, the nature of the industry in these coastal waters requires significant investments in vessels and necessary crabbing equipment, often hundreds of thousands of dollars. Several families and their resources are dependent on the operation of these businesses.

In coastal waters, as in Puget Sound, the dungeness crab stock is a resident population. In coastal waters, the crab mature at three to four years. The traditional coastal dungeness crab season for licensed commercial fishermen runs from December 1 through September 15 of each season. In these waters, the fall closure is necessary because most dungeness crab molt in late summer and are subject to increased mortality if handled before their shells harden in mid-winter. The December 1 opening is scheduled to assure that crabs are filled with meat and have obtained their highest marketability and resistance to handling mortality before fishing begins. In other words, the coastal crab season differs from the Puget Sound season because crab in Puget Sound molt earlier.

As in Puget Sound, this crab fishery, because of its local resident nature and fluctuating returns of harvest, also requires a management plan of uniform regulations.

C. ISCA and WDCFA's Participation in This "Shellfish" Sub-Proceeding.

In 1991, sixteen Indian tribes with reservations on Puget Sound were permitted to bring a sub-proceeding seeking a right to harvest shellfish throughout Puget Sound. The background for shellfish litigation was set forth in *Romero v. Kitsap County*:

In one of his subsequent decisions, Judge Boldt stated:

> 'In order to be entitled to exercise off-reservation treaty fishing rights to nonanadromous fish and *shellfish,* any tribe party to this case shall, *prior* to any attempt to exercise such rights, present *prima facie evidence* and *arguments* supporting its claim to treaty entitlements to such nonanadromous fish and shellfish upon which the *court* may make a *preliminary determination* as to the tribe's entitlement to such *species,* pending final determination of tribal treaty-right entitlement to nonanadromous fish and shellfish. . . .'

Romero v. Kitsap County, 931 F.2d 624, 629 (9th Cir. 1991) (emphasis added).

Prior to any substantive ruling, ISCA moved in a timely fashion to intervene in these proceedings. This motion to intervene, as well as other motions of the parties, was not acted upon by the court, and the case stayed in this posture for more than a year.

Sixteen months later, in January, 1993, the Honorable Edward Rafeedie held a pretrial conference in Seattle, Washington. In the process of disposing of numerous matters, Judge Rafeedie ruled from the bench that the pending motions to intervene would be denied, including the motion of ISCA. The court held that the interests of the applicant/intervenors were adequately represented by others. The judge's personal view of intervention was articulated at the hearing:

> [I]n general that I am not in favor of a whole lot of intervention for the reason that it clutters up the case. It administratively makes it very difficult to administer, inundates the Court with papers, and my experience has been, and even in this case, that intervention really produces very little contribution.

Tr. of Ruling from Bench at 3-4, No. CV 9213, Sub-proceeding 89-3 (W.D. Wash. Jan. 27, 1993).

ISCA was given the right to file an *amicus curiae* position. Most importantly, the district court expressly stated that "they may have the right to seek intervention if the posture of the case changes in a *critical* way some time in the future." Tr. of Ruling from Bench at 11-12.

With this assurance from the district court, ISCA did not appeal this order denying intervention. The 26 Tideland and Upland Property Owners did, and that appeal was resolved in their favor on November 2, 1993. *United States v. Washington*, No. 93-35324 (9th Cir. Nov. 2, 1993) (Memorandum). The Ninth Circuit reversed the order of the district court and remanded the issue. The 26 Tideland and Upland Property Owners were then allowed to intervene.

In the interim, in August, 1993, the district court granted the tribes' summary judgment motion that shellfish are fish, holding that the "right of taking fish" in the Stevens Treaties, included the right to take shellfish. But even so, in November, 1993, the district court noted that in its view, the appeal of the Property Owner applicants for intervention was "*premature,*" expressly reiterating that "the denial of intervention was made without prejudice to renew. . . ."

Later in the proceedings, two ocean coastal tribes, the Quileutes and the Hohs, started signing on to tribal pleadings. Previous to this time, as the court noted, "*they were not active participants, and they sought no relief.*" *United States v. Washington,* 873 F. Supp. 1422, 1527 n. 1 (W.D. Wash. 1994) (emphasis added). App. 51.[4]

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[4] In this *amici curiae* brief, all references to "App. ——" refer to the Joint Appendix to the Petitions filed in this Court. All

In addition, the State signed a "Stipulation" with the Quinault Indian Nation on February 15, 1995. That stipulation provided that the State of Washington and the Quinault Indian Nation would *retrospectively* be "jointly bound by the Court's interpretation of the Stevens Treaties and the construction of the treaties contained in the December 20, 1994, Memorandum Opinion and Order." *United States v. Washington*, No. CV-9213, Sub-proceeding 89-3 (W.D. Wash. Feb. 15, 1995).

As a result, ISCA (Puget Sound) renewed the motion to intervene and WDCFA (coastal waters) sought leave to intervene in the same motion. Mot. for Intervention of Inner Sound Crab Association and Washington Dungeness Crab Fishermen's Association, *United States v. Washington*, No. 9213, Sub-proceeding No. CV-89-3 (W.D. Wash. Mar. 16, 1995). Importantly, as the district court noted just three months earlier, the coastal tribes were not previously "*active participants, and they sought no relief.*" *Washington*, 873 F. Supp. at 1427 (emphasis added). App. 51. Accordingly, WDCFA moved to intervene within weeks of these coastal tribes signing on to the pleadings and other stipulations noted *supra*. In the interim, the court had not entered any other substantive order.

On the basis of the written submissions, and without an additional hearing or opportunity to argue, the district court denied both motions to intervene. The district court's express statement that "they may have the right to seek intervention if the *posture of the case changes* in a critical way some time in the future," turned out to be nothing more than an empty promise. Tr. of Ruling at 11-12.

Both ISCA and WDCFA appealed the denial of their motions to intervene. A divided panel of the Ninth Cir-

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references to "*Amici* App. ——" refer to the Appendix to this *amici curiae* brief.

cuit affirmed that denial on the basis that the motions to intervene were "untimely." *Washington*, 86 F.3d at 1501. The dissent of Judge Kleinfeld put the issue in a different perspective. *Washington*, 86 F.3d at 1507 (Kleinfeld, J., dissenting). The dissent is reproduced as *Amici* App. A at 1a-6a.

Judge Kleinfeld recognized that ISCA and WDCFA were denied the opportunity to participate in a court administered regulatory system that vitally affects the interests of all members:

> The district court regulates the industry in which the proposed intervenors earn their livelihoods. They should be allowed to sit at the table where the compromises are made which will determine whether they can continue to earn an honest living in that industry.

Id. at 1509.

A timely petition for rehearing and suggestion for rehearing *en banc* was filed on the same date. *Washington*, 86 F.3d 1499 (No. 95-35446). That petition was subsequently denied in August, 1996.

In the petition, ISCA and WDCFA maintained that the majority misconstrued a confusing fact situation in reliance on the opinion of the district court. The opinion of the district court was confusing because the court addressed several pending motions for intervention in one order. Unfortunately, this confusion may have been inadvertently perpetuated by ISCA and WDCFA when they agreed to a consolidated oral argument with others in the appeal on the motions to intervene.

In any event, at approximately the same time, ISCA and WDCFA also filed a brief as *amici curiae* in the Ninth Circuit. The Ninth Circuit rejected the arguments (and all others). The district court was affirmed in every significant respect.

D. The Impact of the Decision of the Ninth Circuit Is Substantial.

The decision of the Ninth Circuit in this case effectively awards a guaranteed 50% of all harvestable shellfish species to less than 1% of the resident population of the State of Washington. In practice, at some point in time the inequity will be even more pronounced. In practice, the 50% will be closer to 60% (or even more) because of the self-regulating nature accorded these treaty rights and other uncontrollable management factors. And in practice, only a select few of the tribal members will actually share this largess.

The membership of ISCA has been devastated by the implementation of this decision. A substantial number of WDCFA members are similarly impacted already.

Francis Paul Prucha, who needs no introduction in matters pertaining to federal Indian policies, generally observed, even before the decision in this case:

> The gap is widening, I fear, between solid historical accounts and the pseudo-historical or mythical accounts adopted and proclaimed by many Indians and their white advocates.

Francis Paul Prucha, *The Challenge of Indian History*, Journal of the West, Jan. 1995, at 3.

The decision of the Ninth Circuit significantly widens this gap, albeit unintentionally. The Ninth Circuit has created a chasm that threatens to consume all of the marine creatures in Puget Sound and in the Pacific Ocean along the entire coast of Washington for 200 miles seaward. *See also* Brief of *Amici Curiae* States of Oregon, *et al., United States v. Washington*, No. 98-1026 (U.S. Mar. 1, 1999).[5]

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[5] The coastal treaty tribes are citing these erroneous decisions in pursuit of even more claims extending far into the 200-mile U.S. Economic Zone in the Pacific Ocean. 61 Fed. Reg. 279 (Jan. 4,

Strict standards of proof regarding treaty time activities have been applied (the correct ones) when tribes resist similar claims of *other* tribes. *United States v. Washington,* 764 F.2d 670, 674 (9th Cir. 1985); *United States v. Washington,* 642 F.2d 1141, 1144 (9th Cir. 1981) *cert. denied,* 454 U.S. 862 (1981). (*See also United States v. Washington,* 730 F.2d 1314, 1318 (9th Cir. 1984)). Certainly, the decision of this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1989), does not support this dual standard. *Fishing Vessel* carefully sets forth the principles and guidelines that should have precluded the Ninth Circuit from accepting the extended claims of the tribes in this case.

Whether the analysis of this Court in *Fishing Vessel* is holding or dicta, in almost all other instances courts have been careful to note that they are:

> [B]ound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when [as here] dictum is of recent vintage and not enfeebled by any subsequent statement.

McCoy v. Massachusetts Institute of Technology, 950 F.2d 13, 14 (1st Cir. 1991).

In this instance, the Ninth Circuit did not adhere to this prudential rule.

1996); 61 Fed. Reg. 28786 (June 6, 1996). And the United States, by the promulgation of emergency regulations, has quickly signed on in support of the tribes' position. The United States Department of Commerce cited the district court's decision to justify "rules" allocating additional new ocean fisheries for "Washington coastal Indian tribes *without any basis in treaty time use.*" An unrelated western Makah boundary of usual and accustomed grounds and stations for salmon was simply "*extended*" south further in the ocean for "three other ocean treaty tribes." 61 Fed. Reg. 279 (Jan. 4, 1996); 61 Fed. Reg. 28786 (June 6, 1996).

Instead, the district court construed *Fishing Vessel* the other way. In more than one instance, the district court summarily and in an inappropriate manner, blurred fundamental issues. Characterizations of this litigation may be as varied as the perspectives from which it is viewed, but one thing is certain. The issues in this case are substantially more than "no brainer" legal issues, as repeatedly stated by the district court at the conclusion of the post-trial proceedings. Any judgment that reflects that point of view is flawed and clearly mistaken. *Fishing Vessel* required more, but the Ninth Circuit did nothing to correct this fundamental misconception.

Lifestyles, livelihoods and the integral nature of many communities in the State of Washington are at stake in this litigation. Nothing in *Fishing Vessel,* including the considered dicta, has been enfeebled by any subsequent statement or case. ISCA and WDCFA (and others similarly situated) should have been secure in the protection afforded by *Fishing Vessel,* where the absence of treaty time use of crab fisheries on the ocean or in deep waters would have demonstrated that such fisheries were not included in the right of "taking fish at all usual and accustomed grounds and stations." None of the equities that led to the treaty allocation of salmon exist for ocean crabbing. The Ninth Circuit opinion turns that justifiable expectation recognized in *Fishing Vessel* on its head.

The result is especially disconcerting for the members of the coastal WDCFA. *After* the August, 1993, "shellfish are fish" order, *after* the January, 1994, order regarding "certain species and *deep-water harvest,*" and right up until the December, 1994, "staked or cultivated" order, the *district court* expressly noted and confirmed that the *coastal* tribes *"were not active participants, and they sought no relief." Washington,* 873 F. Supp. at 1427, n.1 (emphasis added). App. 51.

Nevertheless, the next month after the decision (January, 1995) *coastal* tribes were permitted to sign on to tribal pleadings and enter into stipulations that purportedly establish the same "treaty rights" on the Washington coast, extending *miles* into the Pacific Ocean. Nothing in *Fishing Vessel* or in any other case justifies this kind of revisionism. Members of WDCFA are justified in their belief that they were "sandbagged." "Trial on the implementation issues took place in May, 1995. *No questions regarding crab or other deep-water species or harvests were at issue.*" Br. of Appellee-Plaintiff Tribes at 10, *United States v. Washington,* 86 F.3d 1499 (9th Cir. 1996) (No. 95-35446). Moreover, *no evidence was even offered* as to these ocean fisheries.

REASONS FOR GRANTING THE PETITION

I. THE IMPORTANT QUESTION OF WHETHER THE NINTH CIRCUIT RELIED ON THE WRONG STANDARD OF REVIEW TO DECIDE THE MEANING OF HISTORICAL INDIAN TREATIES SHOULD BE AUTHORITATIVELY RESOLVED BY THIS COURT.

The parties in this case have already directed the attention of this Court to this important question. Pet. for a Writ of Certiorari at 28-30, *State of Washington v. United States,* No. 98-1026 (U.S. December 22, 1998); Pet. for a Writ of Certiorari at 11-20, *Puget Sound Shellfish Growers v. United States,* No. 98-1028 (U.S. December 28, 1998); Pet. for a Writ of Certiorari at 24-26, *26 Tideland and Upland Private Property Owners ("UPOW") v. United States,* No. 98-1039 (U.S. Dec. 28, 1998). In addition, the cases cited in the petitions establish that the Ninth Circuit applied the wrong standard of review. The principles set forth in the cases that support this conclusion will not be repeated here.

Rather, ISCA and WDCFA put this argument first to emphasize what is clearly a *compelling* reason to grant review.

This standard of review issue has not only created conflict among the circuits, but it has also caused conflict within the circuits. *Mille Lacs Band v. State of Minnesota,* 124 F.3d 904, 917, 921 (8th Cir. 1997) *cert. granted,* 118 S. Ct. 2295 (No. 97-1337) argued Dec. 2, 1998 (wrong standard). *See also* the pathfinding *en banc* decision in *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984), that the Ninth Circuit ignored. This important question regarding the correct standard of review should be settled by this Court.

II. THE IMPORTANT QUESTION OF WHETHER TRIBES HAVE A RIGHT TO HARVEST DEEP-WATER SHELLFISH AND OTHER SPECIES, KNOWN OR NOT KNOWN AT TREATY TIME, FROM PLACES THAT WERE NOT USED BY TREATY TIME INDIANS FOR SUCH HARVESTING, SHOULD BE AUTHORITATIVELY RESOLVED BY THIS COURT.

In the process of accepting the tribes' legalistic analysis of treaty language unrelated to any historical perspective, the Ninth Circuit departed from basic tenets in this area of federal Indian law. The Cohen Handbook, ordinarily viewed as a tribal advocacy text, correctly states the controlling principle:

> The allocation of the *right* to take fish in *Fishing Vessel* was *based* on the *understanding* and *intent* of the Indians *and* the United States negotiators at the treaty negotiations. The Indians "*depended* heavily on anadromous fish as a source of food, commerce, and cultural cohesion;" [quoting *Fishing Vessel,* 443 U.S. at 686]

Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) ch. 8, § B3c, at 454 (emphasis added).

The decisions in the Ninth Circuit do not reflect any such understanding and intent. The "right" of taking fish cannot be mechanically expanded and applied to crab, sea urchins, sea cucumbers, or all other species *without* any regard to where tribes historically harvested such species or without any regard to whether such species were, like salmon, vital to the tribes' cultural and economic activity at treaty time.

A separate judicial proceeding was instituted here because the *nature and scope* of that right and *historic use* was *not* readily apparent and a treaty right to particular species was not clearly established in the treaty itself. *See Romero*, 931 F.2d at 624. As the Ninth Circuit explained in a different case involving the interpretation of a treaty:

> [T]he Supreme Court determined the nature of [the salmon fishing] those rights not by parsing the term "in common with," but by examining other words in the Treaty, *their historical context, the practical construction of the right, and the parties' intent.*

Cree v. Waterbury, 78 F.3d 1400, 1404 (9th Cir. 1996) (emphasis added).

In this context, a treaty right to harvest deep-water shellfish from places that were unknown or unused at treaty time is contrary to treaty language as well as the intent and understanding of the treaty negotiators.[6]

The State has set forth in its petition the major points and arguments that clearly show the errors of the Ninth

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[6] The Ninth Circuit failed to recognize that defining the scope of the treaty right is different from the issue of whether tribes may use modern improvements to harvest shellfish beds that were at one time harvested with ancient technologies. In this respect, we agree with the State that modern techniques may improve on traditional methods, but modern gear does not alter the nature of the treaty or expand it beyond treaty time fishing. The district court made no findings of fact about treaty time deep water shellfish use. *Washington*, 873 F. Supp. at 1430-31.

Circuit with specific reference to the deep water crab and other fisheries. To avoid repetition, ISCA and WDCFA adopt by reference, those arguments and points. Pet. for a Writ of Certiorari, *State of Washington v. United States,* No. 98-1026 (U.S. March 1, 1999).[7]

The State is correct in asserting that the historic harvest of crabs did not occur in the deep waters frequented by ISCA (Puget Sound) and WDCFA (coastal and Pacific Ocean). Indians never customarily harvested these shellfish, and the Ninth Circuit could not, by oversimplification, summarily conclude that areas of salmon fishing rights would, as a matter of law, include any and all shellfish harvests, including crab.

The law of the case itself requires more. Judge Boldt required the tribe to prove:

> The *species taken at treaty times, where* (usual and accustomed grounds), and by *what tribes* (who are entitled to exercise treaty entitlement) . . .

United States v. Washington, 459 F. Supp. at 1038 (W.D. Wash. 1978) (emphasis added).

The tribes could not and did not meet this fundamental burden in the district court. The record is devoid of any such evidence. The Ninth Circuit should not have ignored this fact.

The State and others have made that argument in a convincing fashion. The point that deserves additional attention here involves the coastal waters and the Pacific Ocean: the crab fishery of WDCFA. Had the district court allowed ISCA and WDCFA intervention and a "seat at the table," this issue would have received adequate

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[7] *See also* the historical arguments in Pet. for a Writ of Certiorari, *26 Tideland and Upland Private Property Owners ("UPOW") v. United States,* No. 98-1039 (U.S. Dec. 28, 1998) that support this position.

consideration. *See* Kleinfeld, J. dissent at *Amici* App. A, 1a-6a. The discussion that follows is intended to insure that this point is not neglected here.

III. THE IMPORTANT QUESTION OF WHETHER ANY USUAL AND ACCUSTOMED GROUNDS AND STATIONS BEYOND THE THREE-MILE LIMIT OF THE TERRITORIAL SEA RECOGNIZED AT TREATY TIME COULD HAVE BEEN ESTABLISHED OR RECOGNIZED BY THE UNITED STATES, SHOULD BE AUTHORITATIVELY RESOLVED BY THIS COURT.

As noted *supra,* following the district court's December, 1994, opinion, coastal tribes, including the Quileutes and the Hohs, began signing on to tribal pleadings. Previously, as the district court stated in note 1 of that opinion, *"they were not active participants, and they sought no relief." Washington,* 873 F. Supp. at 1427 n.1 (emphasis added). App. 51.

In addition, we have made reference to another coastal tribe, the Quinault Indian Nation, and to the "Stipulation" with the Quinault Indian Nation signed shortly thereafter and filed with the district court. That Stipulation provided that the State and the Quinault Indian Nation would *retrospectively* be "jointly bound by the courts' interpretation of the Stevens' Treaties and the construction of the treaties contained in the December, 1994, Memorandum Opinion and Order."

In the order regarding implementation filed in August, 1995, the district court concluded, without further explanation:

> The Tribes bound by this implementation plan are: Lummi, Nooksack, Upper Skagit, Swinomish, Tulalip, Muckleshoot, Susquamish, Puyallup, Nisqually, Squaxin Island, Skokomish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha S'Klallam,

> *Makah, Hoh,* Stillaguamish, Sauk Suiattle and *Quileute.* Other Tribes may become signatories to this Plan by the agreement of all parties to the Plan or by order of the Court.

United States v. Washington, No. CV-9213, Sub-proceeding No. 89-3 (W.D. Wash. Aug. 28, 1995) (Order Re: Implementation of Shellfish Proviso).

Even this paragraph did not include the Quinault Indian Nation and yet they participated in the Ninth Circuit.

In our intervention appeal, the other tribes acknowledged that "the coastal Tribes (Quinault, Hoh and Quileute) did not seek relief in this subproceeding." Br. of Appellee-Plaintiff Tribes at 12, *United States v. Washington,* 86 F.3d 1499 (9th Cir. 1996) (No. 95-35446). This issue is further clouded by the fact that, with the exception of the Makah, coastal tribes did not have any usual and accustomed grounds and stations that extended significantly into the Pacific Ocean. At this point in time, however, the scope of their claims is wholly unrestricted. *See* discussion of Regulations *supra* at n.5. The only thing that emerges from any of this is the scope of the usual and accustomed grounds and stations established for salmon in *Washington,* 730 F.2d 1314 (Makah Pacific Ocean adjudication). Even there, the issue deserves to be revisited.

In the Ninth Circuit, ISCA and WDCFA briefly discussed the Makah tribe's previous claim to the right to take salmon 100 miles off shore in the Pacific Ocean. This isssue was raised in a separate proceeding in *Washington,* 730 F.2d 1314 (Makah). The Makah tribe cited Dr. Lane's account of 100-mile whaling trips in 1897 in support of their claim. The Ninth Circuit rejected that evidence and interpreted the treaty in reliance on what was described as more definite historic use submissions (extending 40 miles off the coast). *Id.*

Even then, the Ninth Circuit failed to address a fundamental concept: the three-mile limit of the territorial sea of the United States recognized at the time of the treaties. *See generally* Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas,* Annapolis, Maryland: Naval Institute Press, (1972):

> The three-mile limit under international law can be defined as the *limitation* of the seaward extension of a coastal state's [nation's] territorial jurisdiction at the outer boundary of a zone of water extending three miles from the shore of that state [nation] . . . . in an ancillary context, with *fishing, one of the most important of the reasons that states* [*nations*] *claim territorial seas. Id.* at 7-8, 43 (emphasis added).

Excerpts of this text are reproduced at *Amici* App. B, 7a-11a.

ISCA and WDCFA would respectfully submit that this important factor arguably undermines any recognition of historical usual and accustomed grounds and stations beyond the three-mile limit of the territorial seas recognized at the time of the treaties. (As such, it would appear to be a relevant matter not already brought to the attention of the Court by the parties, within the letter and spirit of S. Ct. Rule 37.1).

For this reason, we think that this fundamental concept and several factors in the Makah litigation should be briefly addressed.

(a) The State of Washington did not actively participate in this Makah controversy. The United States and the Makah tribe appeared to be the "adversaries."

(b) The brief for the United States, filed in the Ninth Circuit at the time, establishes the true nature of this adversarial procedure. Note the following "undisputed" "unchallenged" points:

> The *only* issue in dispute in this proceeding is whether the evidence presented by the Makah Tribe, *all of which was undisputed,* was sufficient to fulfill the tribe's burden of supporting its broad claim. Brief of Plaintiff-Appellee United States of America at 8, *United States v. State of Washington,* No. 83-3802 (9th Cir. Nov. 18, 1983) (second emphasis added).

> The purely factual findings recommended by the special master concerning activity of the Makah Indians at and prior to treaty times were *not challenged* and were adopted by the court. . . . The master's report consisted *solely* of his recommended order and he made *no comment* on why he reached any particular conclusion. . . . In summary, however, the *sole* evidence of that issue was the written report and oral testimony of Dr. Barbara Lane. *Id.* at 9 (emphasis added).

> [T]hat is irrelevant here because *no challenge* was, or is, made to their demeanor or credibility. *None* of their statements is *disputed* in any way. *Id.* at 12 (emphasis added).

We respectfully submit that these concessions shed light on the adversary process in *Makah.* This is the light in which the issues should be viewed in terms of the crab and other fisheries now at stake in the Pacific Ocean as a result of the decision of the Ninth Circuit below.

(c) The Brief for the United States in the Makah litigation is also significant in one other respect. The United States made no mention of the three-mile limit rule or the role played by that rule in the history and law of the United States—a role especially significant at the time these treaties were negotiated. One would think that some basic reference to this concept would be made in litigation seeking the establishment of "rights" beyond those limits. In the Makah litigation, no one mentioned the three-mile limit rule.

As *Amici* below, we brought the excerpts from the text entitled *The Three-Mile Limit of Territorial Seas* to the attention of the Ninth Circuit. It was our position that a further discussion of this issue (by the *tribe* and the *United States*) would complete the historical perspective. Of course, we really doubted that any response would be forthcoming—at least not in briefs submitted in the Ninth Circuit. No response was forthcoming. The Ninth Circuit never mentioned the issue. *See generally,* Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas,* Annapolis, Maryland: Naval Institute Press, (1972). *See also* excerpts of this text reproduced at *Amici* App. B at 7a-11a.

Beyond question, this rule was part of the "common notions" of United States policymakers in the 1850's. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 151, 206 (1978). It played no role in the Ninth Circuit. Yet the nature and limits of federal power over the three-mile territorial sea should have informed the court when determining what rights were intended by the treaty. It should have confirmed that tribes were not securing rights in fisheries miles off-shore, in crab or other fisheries not previously used by the treaty time Indians.[8]

CONCLUSION

For the foregoing reasons, the Petition should be granted.

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[8] The discussion in *Fishing Vessel*, 443 U.S. at 690-691 was not directed to this issue. If the three-mile territorial sea issue is not addressed in the brief for the United States, we would respectfully submit that it would be appropriate to invite the Solicitor General to express the views of the United States on this question. At the very least, the Government's "litigating position" should be clearly stated. *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993).

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. v. Washington, 86 F.3d 1499
(9th Cir. 1996) (Kleinfeld, J., dissenting)

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

With respect to timeliness, two aspects of this case justify the prospective intervenors' delay. First, they do not seek to relitigate what the court decided prior to the motions to intervene. Though they do not agree with the court's decisions, their motions ask leave to intervene only with respect to the implementation plans to be prepared subsequently, and a subsequent appeal.

The majority opinion misconstrues the intervenors' position as an attempt to relitigate what has already been decided. The parties seeking intervention do not agree that sea cucumbers etc. are fish covered by the treaty, but they say expressly in their motion to intervene that they do not propose to relitigate it in the district court:

> Inner Sound . . . move[s] . . . for intervention in this action for the limited purpose of participating in the negotiation and formation of those provisions of the Court's implementation plan pursuant to the Court's memorandum opinion and order dated December 20, 1994 and any and all proceedings related to the Implementation Plan or implementation of this Court's decision of December 20, 1994. Applicants for intervention do not seek to relitigate previously decided issues, to reopen evidentiary issues, or to conduct discovery unrelated to their requested participation herein.

Harvest Divers likewise limit their motion to intervene. Their motion says they "accept the record in this proceeding as it is made to date," but they want to protect their

right to appeal the sea urchin and sea cucumber ruling now that the Washington Attorney General has withdrawn from its previous opposition to it, and want to be allowed to participate in the negotiations regarding implementation of the district court's implementation plan.

As the majority opinion concedes, the general rule disfavoring post-judgment motions to intervene does not apply if the motion seeks only to participate in the appeal. *United States ex rel. McGough v. Covington Technologies,* 967 F.2d 1392, 1395 (9th Cir. 1992); *Yniguez v. State of Arizona,* 939 F.2d 727, 734 (9th Cir. 1991). That exception applies here precisely, insofar as what they intervenors seek is the ability to participate in an appeal. It applies by analogy, insofar as the intervenors seek only to participate in the implementation negotiations following the court's decision on the substantive issue of whether the crabs, sea urchins and the sea cucumbers are fish covered by the treaty.

Second, the rule disfavoring post-judgment litigation had no application when the motions to intervene were denied, because this case had not gone to final judgment. As the majority opinion concedes, the motions to intervene were filed in March and denied in April, and the court directed that final judgment be entered in accord with its decision in August. Actually, final judgment is probably a misnomer even at that later time. There has been a final decision by the district court on an issue, but nothing to suggest that the litigation has reached an end. This litigation began in 1970. It has gone on for 2½ decades, and promises to go on indefinitely into the future, as the district court protects treaty rights to the fish in the circumstances arising from time to time. This is not like a traditional suit at equity, such as a suit for specific performance of a contract to convey real estate. In that kind

of lawsuit, the final judgment enjoins the defendant to execute a conveyance, he does, and the case is over. This case will not be over. The opinion purporting to be the decision on which final judgment was issued says that "because the Court desires to have the benefit of the parties' prior experience in *Washington I*, the Court defers the issue of injunctive relief or any plan of implementation until there has been input from the parties." *United States v. State of Washington*, 873 F.Supp. 1422, 1450 (W.D. Wash.1994). It does not purport to end the district court's control of the industry, end the process of adjudicating Indian treaty rights regarding the industry, or to be the injunction sought under Federal Rule of Civil Procedure 65(d). The district court determination that it needed "input from the parties" before issuing an injunction shows that what had been issued was not the final judgment.

In practical effect, the United States District Court regulates the Puget Sound fishery to protect treaty rights, has done so for twenty-five years, and there is no reason to doubt that it will do so for another twenty-five years. Where a district court controls an industry for decades or indefinitely, the length of the lawsuit makes it inequitable to exclude late participants in the manner which would be appropriate for a traditional suit at equity. *See Textile Workers Union v. Allendale Co.*, 226 F.2d 765, 767 (D.C.Cir.1955) ("Obviously tailored to fit ordinary civil litigation, these provisions require other than literal application in atypical cases").

In twenty-five years, the sea changes, in terms of what creatures are scarce or plentiful in Puget Sound, the technology changes, in terms of how practical it is to fish for one or another creature, and the market changes, in terms of how interested Japanese or American consumers may be in the catch. The eleven-year old child of a halibut

fisherman when this lawsuit started in 1970 may now be the thirty-six year old skipper of a crab boat, with a different kind of participation in the industry and different economic interests than his father's. Where a federal district court makes itself a permanent regulatory agency for an industry, it ill behooves the judiciary to exclude people who earn their living in the industry from being heard on how they shall be regulated, on the ground that they did not complain about other decisions at an earlier time.

As for prejudice to other parties by prolonging the litigation, there is no such thing as prolongation of something which has no end. Nor should we be concerned with preserving a delicate compromise the parties may work out, if other parties with important, unrepresented interests are excluded. A compromise between A and B in which they decide to take C's fish does not deserve protection.

As for reasons for delay, there are two reasons why this factor should not cut against the intervenors. One is that the reasons were adequate. Intervention would not have been necessary had the state won a substantive decision that the sea creatures were not covered by the treaty, and Harvest Divers would not have needed to intervene if Inner Sound had succeeded. Second, intervention in a huge suit at equity is very expensive. Someone must pay the lawyers. Parties with economic interests necessarily must weigh the huge litigation expense against the risk, and postpone bearing the expense as long as possible. We should not add to the risks and increase the penalties for late intervention, in a long-term regulatory equitable proceeding such as this one. That would cause numerous parties to intervene earlier, wasting their money and the court's time. The prospective intervenors' practical decision to let the Washington Attorney General do the work so long as she was on their side saved themselves and their adversaries money, and saved the court as well as the par-

ties a great deal of needless effort. That is praiseworthy, not punishable.

The would-be intervenors have "an interest relating to the property of the transaction which is the subject of the action" and are "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest." That is the standard for mandatory intervention under Federal Rule of Civil Procedure 24(a). The intervenors' interest is protected by the treaty, by the same words as the Indian tribes' interest. The words of the Indian treaty, which is the basis for the claims asserted in this action, protect "all citizens," not just the Indian tribes:

> The right of taking fish, at all usual and accustomed ground and stations, is further secured to said Indians, *in common with all citizens* of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horse on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens.

Art. III of the Treaty of Medicine Creek, 10 Stat. 1133 (as quoted in *Washington v. Washington State Commercial Passenger Fishing Vessel Association (Fishing Vessel)*, 443 U.S. 658, 674, 99 S.Ct. 3055, 3069, 61 L.Ed.2d 823 (1979) (emphasis added)).

The Supreme Court has already construed these words to create a treaty right to fish for non-Indian fishermen as well as Indian fishermen. "*Both sides* have a right, secured by treaty, to take a fair share of available fish." *Id.* at 684-85, 99 S.Ct. at 3074 (emphasis added). That means that the non-Indian fishermen have a "right, secured

by treaty." It may be that the State of Washington adequately represented the interests of the would-be intervenors prior to the decision on the substantive issue of whether the sea cucumbers, etc., are fish covered by the treaty. If so, then the would-be intervenors were, prior to that decision, "adequately represented by existing parties," so they were not entitled to intervention. Fed.R.Civ.P. 24(a). But once the state changed its position, then the would-be intervenors' interests were no longer "adequately represented by existing parties." That entitled them to intervene as of right.

Rule 24 is traditionally construed liberally in favor of intervention. *See, e.g., Wahington State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman,* 684 F.2d 627 (9th Cir.1982). Where there is "a relationship between the legally protected interests and the claims at issue," that is generally enough for intervention. *Sierra Club v. EPA,* 995 F.2d 1478, 1484 (9th Cir.1993). The intervenors' claims in this case relate to their legally-protected interests under the treaty to share the fish in common with the Indian tribes. Reliance before the substantive decision on the state was a reasonable justification for delaying the motion to intervene until afterward, as we held in *Yniguez v. State of Arizona,* 939 F.2d 727.

The district court regulates the industry in which the proposed intervenors earn their livelihoods. They should be allowed to sit at the table where the compromises are made which will determine whether they can continue to earn an honest living in that industry.

APPENDIX B

Swarztrauber, Sayre A., *The Three-Mile Limit of Territorial Seas,* Annapolis, Maryland: Naval Institute Press, (1972):

> That the three-mile limit did emerge and exist as a rule of international law scarcely needs proving, although in the course of this book that will be accomplished for reasons of completeness.

Id. at 2.

> [T]his book gathers pertinent information and data concerning the three-mile limit from all available sources, and organizes it in historical sequence, utilizing the three-mile rule itself as the *central* theme.

Id. at 3 (emphasis added).

> The *territorial sea* is that belt of the sea adjacent to the coast of a state, beyond its land territory and its internal waters, over which the *sovereignty* of the state extends.

Id. at 3 (emphasis added).

> The three-mile limit under international law can be defined as the *limitation* of the seaward extension of a coastal state's territorial jurisdiction at the outer boundary of a zone of water extending three miles from the shore of that state. The miles are nautical miles, and they are measured from the low-water mark.

Id. at 7-8 (emphasis added).

> The three-mile limit of territorial seas, as a rule of international law, did not surface until the eighteenth century, but the concept of territorial seas had developed much earlier.

Id. at 10.

> [C]oncept that jurisdiction over the adjacent seas was a function of the effective extent of control from the land, a concept which would capture the fancy of statesmen for the next 300 years.

Id. at 20.

> Neither of these concepts dealt, except in an ancillary context, with *fishing, one of the most important of the reasons that states claim territorial seas.*

Id. at 43 (emphasis added).

> On November 8, 1793, Jefferson sent notes, almost identical in substance, to Genet and to the British minister, Mr. G. Hammond, fixing "provisionally" United States' territorial seas at three miles.

Id. at 57.

> Concerning Jefferson's mention of the three-league practice, it must be assumed that as Secretary of State he was familiar with the provisions of the 1763 Treaty of Paris between England and France, *fixing a three-league fishing zone along the North American mainland.*

Id. at 59 (emphasis added).

> The Act of 1794 . . . Seven months after the Jefferson notes were delivered to Genet and Hammond, the three-mile limit became the law of the land, enacted by the Congress of the United States:
>
> > Section 6. And be it further enacted and declared, that the *district courts* shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States or within a *marine league* of the coasts or shores thereof.[27]

Id. at 59-60 (emphasis added).

> *The Fishing Convention 1818* . . . With these several court cases, the three-mile limit had been ad-

> vocated by publicists, adopted as foreign policy, incorporated into domestic statutes, and upheld by the courts. All that was lacking was the recognition of the three-mile limit between governments in the form of an international treaty. *This came in 1818.*

Id. at 61.

> Convention of 1818 . . . The Americans wished to fish Canadian waters right up to the shore; the British wished to exclude them entirely. A compromise was inevitable, and again it was a *three-mile limit that became the compromise solution.* The key sentence in the Convention of 1818 reads:
>
> > And the United States hereby renounces, for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America . . . .

Id. at 63 (emphasis added) (footnote omitted).

> While the Americans would have preferred a *wider* territorial sea along their own coast, *they felt they had more to gain by exploiting the British fisheries up to within three miles, than they might lose if foreigners were to fish within three miles of the American coast.*
>
> Thus, illogically, it was a struggling, infant republic that launched the *three-mile rule,* for purposes of neutrality *and for fishing,* and for reasons quite beyond its control.

Id. at 63 (emphasis added).

> Hall's *Treatise* was first published in 1880 and has gone through eight editions. In it, he concluded that the three-mile limit is so well-fixed that it *must*

> *be assumed that a state adheres to it in the absence of an express notice to the contrary.*

Id. at 69 (emphasis added).

> At the same time, Hall seemed quite satisfied with the consistency of British adherence to the three-mile limit by pointing out a *singular departure, the Treaty of Washington of 1846, dividing the 15-mile wide Strait of Juan de Fuca equally between Britain and the United States.*

Id. at 69 (emphasis added) (footnote omitted).

> *United States.* [*S*]*he did not waiver, at least on a formal, official basis, from her 1793 position. On several occasions, in fact, she protested violations of, or departures from, the three-mile limit.*

Id. at 77 (emphasis added).

> Thus, the nineteenth century saw the three-mile rule become a fairly *well-established rule of international law.* All the great powers, and *most* of the lesser ones, had adopted the rule in some form.

Id. at 88 (emphasis added).

> California's State Constitution of 1849 had provided for ownership of the seabed out to three miles . . . .

Id. at 159 (footnote omitted).

> *Fishing.* Very early in U.S. history, the three-mile limit was considered adequate for *fishing* because of the favorable terms of the Convention of 1818 . . . . Then in 1964, she declared her exclusive rights to the living fishery resources of the continental shelf and followed this two years later with a twelve-mile fishing limit for her own coasts.

Id. at 238 (emphasis added).

> The three-mile limit failed primarily on the grounds that it did not provide coastal states a wide enough exclusive *fishing* zone.

Id. at 254 (emphasis added).

The text also quotes the views of "experts" in the area.

> It is very difficult to conceive upon what theory or by what authority any State acting alone could do any such thing, as the *existing jurisdiction rests solely upon common consent as manifested by usage.*

Id. at 127 (emphasis added) (footnotes omitted).

> In the actual conduct of affairs, it is *seldom challenged,* and *never* successfully so . . . . It has, what is still more important, sunk into, and become firmly rooted in, the consciousness of all seafaring men, who are not experts in law and whose ideas it is dangerous to unsettle.

Id. at 129 (emphasis added) (footnote omitted).

> The three-mile limit was supported by international arbitration as early as 1855. A United States-British Claims Commission was appointed under a convention of February 8, 1853, between the two countries. The Commission was to consider the case of the American fishing schooner *Washington,* which, on May 10, 1843, had been seized while fishing ten miles from the shore in the Bay of Fundy, taken to Yarmouth, Nova Scotia . . . Accordingly on January 13, 1855, he decided the case on the basis of the three-mile rule in favor of the American owners of the *Washington.*

Id. at 85 (emphasis as in original) (footnote omitted).

Supreme Court, U.S.
FILED
MAR 1 1999
CLERK

Nos. 98-1026, 98-1028, 98-1039 and 98-1052

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF WASHINGTON, PETITIONER
v.
UNITED STATES OF AMERICA, ET AL.

PUGET SOUND SHELLFISH GROWERS, PETITIONER
v.
UNITED STATES OF AMERICA, ET AL.

26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS, ET AL., PETITIONERS
v.
UNITED STATES OF AMERICA, ET AL.

LARRY B. AND SHIRLEE ALEXANDER, ET AL., PETITIONERS
v.
UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "right of taking fish at all usual and accustomed grounds and stations * * * in common with all citizens," reserved by respondent Indian Tribes in the Stevens Treaties, entitles the Tribes to take an equitable measure of the harvestable shellfish of every species found within their customary fishing areas, except as limited by the shellfish proviso.

2. Whether the treaty "right of taking fish at all usual and accustomed grounds and stations * * * in common with all citizens" entitles the Tribes to harvest shellfish on private lands and to gain access to private uplands for the purpose of exercising shellfishing rights in the absence of access by other means.

3. Whether the court of appeals correctly applied the "moderate living" doctrine of *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

4. Whether the court of appeals correctly interpreted the shellfish proviso, which excludes the Tribes from taking shellfish from "beds staked or cultivated by citizens."

5. Whether the court of appeals correctly refused to apply the doctrine of laches to bar this suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-49) is reported at 157 F.3d 630. The opinions of the district court are reported at 873 F. Supp. 1422 (Pet. App. 51-93), 898

F. Supp. 1453 (Pet. App. 95-134), and 909 F. Supp. 787 (Pet. App. 135-148). Additional opinions of the district court (Pet. App. 153-162) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1998. The petitions for rehearing were denied on September 25, 1998. Pet. App. 8-9. The petitions for a writ of certiorari in Nos. 98-1026 and 98-1039 were filed on December 22, 1998, and the petitions in Nos. 98-1028 and 98-1052 were filed on December 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1854 and 1855, respondent Indian Tribes of what is now western Washington State entered into the Stevens Treaties,[1] under which they relinquished their right to most of their territory in exchange for periodic monetary payments, small parcels of land set aside for their exclusive use, and certain other guarantees, including the preservation of their aboriginal fishing rights throughout their ceded lands in Puget Sound. In essentially identical language, each of the Treaties provided:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians,

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[1] The treaties are known as the "Stevens Treaties" because Isaac Stevens, the Governor and Superintendent of Indian Affairs for the Washington Territory, was directly involved in their negotiation. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666 (1979). Each of the Tribes in this litigation (see Pet. App. 9 n.1) is the successor-in-interest to one or more of those treaties, which include the Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132; the Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; the Treaty of Point No Point, January 26. 1855, 12 Stat. 933; the Treaty with the Makah, January 31, 1855, 12 Stat. 939; and the Treaty of Olympia, July 1, 1855, 12 Stat. 971. See Pet. App. 169-209.

> in common with all citizens of the Territory, * * *: Provided, however, That they shall not take shell fish ~~from any beds staked~~ or cultivated by citizens[.]

Pet. App. 12; see, *e.g.*, *id.* at 170.

Both the United States and the Tribes viewed protection of the Tribes' fishing rights on the ceded lands as an essential ingredient of the Treaties. See Pet. App. 10-11; *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 665-668 (1979) (*Fishing Vessel*). From time immemorial, the Tribes have used and relied on fish, including shellfish, for commercial, subsistence, and ceremonial purposes. See *ibid.*; see also *United States* v. *Winans*, 198 U.S. 371, 381 (1905) (fishing was "not much less necessary to the existence of the Indians than the atmosphere they breathed"). At the time of the Treaties, the Indians took an enormous variety of fish, including over 100 species of shellfish. Shellfish were particularly important to the Tribes because of their dependability and accessibility, especially when other sources of food became temporarily scarce. S.E.R. 1033-1034. The Tribes traded shellfish with other Indians and with non-Indians, supplying most of the non-Indian settlers' fish, including clams and oysters. *Fishing Vessel*, 443 U.S. at 666 nn. 7 and 8; E.R. 54-55.

By treaty time, a shellfish cultivation industry had begun to develop in the Washington Territory. The United States treaty negotiators were familiar with the practices of that industry, modeled after the older, larger, and more developed industry on the East Coast.[2] Pet. App. 11. The industry was based primarily on the planting or transplanting of shellfish, primarily oysters, in artificial beds.

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[2] In the mid-nineteenth century, shellfishing was a major industry that employed a large number of people. It was regularly covered by the popular press, and its practices were generally known to the public. S.E.R. 116.

Shellfish farmers also commonly stored market-sized shellfish in beds that did not naturally contain the kind of shellfish being stored, and they identified the boundaries of those man-made storage areas by marking them with stakes extending above the surface of the water. *Ibid.* The popular literature, professional treatises, government studies, and state shellfish laws of the time all confirm a basic fact of the mid-19th century shellfish industry: natural oyster beds, then considered "the common property of the people," *id.* at 61, were not staked or cultivated, *id.* at 61-66.

Fish, including shellfish, were exceptionally abundant and were considered inexhaustible at treaty time. Pet. App. 11. The United States negotiators thus believed that preserving the Tribes' off-reservation fishing rights would not interfere with the rights of citizens. The negotiators, aware of the thriving shellfish industry on the East Coast, assumed that development on Puget Sound also would not interfere with the Tribes' exercise of their treaty fishing rights. *Ibid.* The treaty negotiators, in keeping with their pledge to preserve for the Indians their ancient fisheries, wrote those assurances into the fishing rights provision of the Stevens Treaties. See *id.* at 27.

2. For years following the Treaties, the Indians continued to harvest a majority of the shellfish resource. During that period, the Washington territorial government continued to observe the public's general right of taking shellfish from natural beds and to recognize private ownership rights only in the products of artificial shellfish beds. After its admission to the Union in 1889, however, Washington took two courses of action that, in combination, increasingly excluded the Indians from the shellfish resource. First, the State gradually began selling off its tidelands, including some of the most productive for shellfish production, to private owners. The "vast majority" of those tidelands are now privately owned. Pet. App. 12. Second,

around the turn of the century, Washington modified state law to give private property owners exclusive rights to shellfish found on natural beds. *Ibid.* Thus, even though the Tribes dominated natural shellfisheries for decades following the Treaties, non-Indians gradually came to monopolize them as increasing numbers of those shellfisheries fell into private hands.

In addition, the shellfish resources of Puget Sound and their availability for human consumption have diminished as a result of tideland development and pollution. Native shellfish have declined dramatically and have been largely replaced by foreign species introduced into the area after the Treaties. Pet. App. 12.[3] This litigation, initiated by the Tribes and the United States, is the consequence of the increasing competition for, and depletion of, the shellfish resource. When this suit was filed, the Tribes' harvest of shellfish had diminished to a tiny percentage of the non-Indian harvest.

3. In 1970, the United States, on its own behalf and as trustee for several of the Tribes, sued the State of Washington in federal district court, seeking declaratory and injunctive relief under the fishing rights provision of the Stevens Treaties. Following extensive pretrial proceedings and a lengthy trial, the district court established the locations of the Tribes' "usual and accustomed" fishing grounds and ruled that the Tribes' treaty rights entitled them to take

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[3] For example, native littleneck clams have been replaced substantially by an introduced species, manila clams, which constituted more than 80% of the total clam harvest in Puget Sound during the years 1988-1990. Pet. App. 12. In addition, the intertidal populations of geoduck clams and crabs, once abundant enough for commercial fisheries, have continued to decline. S.E.R. 996, 1009. Today, most of those species, along with octopus, sea urchins and sea cucumbers, are found in deep waters. See Wash. Pet. 4-5; S.E.R. 970.

up to 50% of the harvestable fish from those grounds.[4] *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (*Washington I*), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). The district court's ruling met substantial resistance from the State and spawned numerous other lawsuits that ultimately reached this Court, where the district court's interpretation of the Treaties was affirmed. See *Fishing Vessel*, *supra*.

4. In 1989, sixteen Indian Tribes, later joined by other Tribes and the United States, followed a procedure established in *Washington I* and sought a declaration of the nature and scope of their off-reservation shellfishing rights under the Treaties and injunctive relief to enforce those rights. Pet. App. 14. Several other groups subsequently intervened in the action: the Puget Sound Shellfish Growers; the Alexander group and Adkins group of private tideland owners; and a group of private property owners affiliated with the United Property Owners of Washington (UPOW).

After extensive pretrial proceedings, followed by a trial lasting three weeks, the district court issued its decision. Pet. App. 51-93. Finding that "shellfish" are "fish" within the meaning of the Stevens Treaties, the district court concluded that the prior decisions of this Court and the lower federal courts over the past 90 years interpreting the Tribes' treaty fishing rights apply fully to shellfish. Accordingly, the district court ruled that the Treaties entitle the Tribes to take an equitable portion of the harvestable shellfish of every species found within the usual and accustomed fishing

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[4] In its original fishing rights decision, the district court endeavored to resolve almost every issue of fact and law concerning the Tribes' "right of taking fish" at their "usual and accustomed" fishing areas under the Treaties. See 384 F. Supp. at 328-331. Thus, the trial and decision included evidence of tribal fishing for many types of fish, including shellfish, although the relief requested and granted was limited to anadromous fish. See *id.* at 312-423.

areas identified in *Washington I*, except as expressly limited by the shellfish proviso. *Id.* at 51-59.

Turning next to the proviso, the district court "interpret[ed] the terms 'staked' and 'cultivated' as the terms were defined and used in the shellfishing industry at and before treaty time." Pet. App. 77. After a thorough review of the historical evidence relating to that issue, the district court determined that the treaty negotiators viewed "natural" beds and "staked or cultivated" beds as mutually exclusive categories, and it concluded that the proviso was intended to exclude the Tribes from artificial, but not natural, shellfish beds. *Id.* at 59-79.

The district court then directed the parties to design a joint implementation plan for the Tribes' shellfish rights under the Treaties. After the parties failed to reach consensus on a plan, the court held a second trial. The district court issued an implementation decision and an implementation plan that, among other things, imposed specific restrictions on the Tribes' ability to harvest shellfish on private properties and set forth a dispute resolution procedures using a special master. Pet. App. 95-134.

5. The State, together with the intervening commercial shellfish growers and private property owners, appealed. The United States and the Tribes cross-appealed from several rulings made by the district court in its implementation decision.

The court of appeals first affirmed the district court's basic interpretation of the Treaties. It concluded that the right of taking shellfish is coextensive with the right of taking other kinds of fish, and that, under the line of authority culminating in this Court's decision in *Fishing Vessel*, the Tribes may take an equitable portion of shellfish of every species found anywhere within their customary fishing areas, except as limited by the shellfish proviso. See Pet. App. 17-25. The court of appeals then affirmed the

district court's interpretation of that proviso, holding, among other things, that petitioners' contrary interpretation violates "black-letter canons" of treaty construction and "is totally inconsistent with the United States' avowed intention to preserve for the Indians their ancient fisheries." Pet. App. 27-28 (internal quotation marks omitted). Although the court reviewed for clear error the district court's findings on certain predicate facts (such as the practices of the mid-19th century shellfish industry and the familiarity of the treaty negotiators with those practices), it "review[ed] de novo whether the district court reached the proper conclusion as to the meaning of the [proviso] given those findings," *id.* at 16, and then independently determined that the district court's interpretation was in fact "correct," *id.* at 26.

The court of appeals reversed portions of the district court's implementation decision, which the United States and the Tribes had challenged in their cross-appeals. The court held, among other things, that the district court had abused its discretion by applying notions of equity to redefine the treaty term "cultivated" so as to limit the Tribes' rights to shellfish from the commercial shellfish Growers' properties. That interpretation, the court reasoned, would result in abrogation of the Tribes' treaty right. Pet. App. 29-32. Rejecting other arguments of the United States and the Tribes, however, the court concluded that "only those Growers' beds that exist solely by virtue of the natural propagation of the species are subject to a full fifty-percent harvest allocation." *Id.* at 34. Thus, where the Growers had enhanced shellfish production on natural beds, the Tribes are entitled to a share only of "the pre-enhanced sustainable shellfish production from those beds." *Id.* at 34-35 & n.12. That allocation analysis, however, does not apply to the

Growers' artificial beds, which the shellfish proviso wholly excludes from the Tribes' treaty rights. *Id.* at 35.[5]

ARGUMENT

Two points of agreement among the parties are essential to a proper understanding of this case. First, the district court found that shellfish are "fish" within the meaning of the Stevens Treaties (see Pet. App. 52, 56-57), and petitioners have acquiesced in that ruling. Second, petitioners present no claim that the Tribes wish to exercise fishing rights in geographical areas where they had historically engaged in no fishing at all. The boundaries of the Tribes' "usual and accustomed" fishing grounds were set in *Washington I*, and all shellfish beds at issue are located within those boundaries. See Pet. App. 19-20, 57-58. The question here is whether the Tribes may take certain *kinds* of fish—shellfish—in those same geographic areas, along with the other kinds of fish that they are unquestionably entitled to take there. See *id.* at 19; *id.* at 57-58; see also Alexander Pet. 18.

As discussed more fully below, the parties' agreement on those two matters is largely dispositive of this case. Because shellfish are "fish," these petitions present few issues that are not squarely resolved, in the Tribes' favor, by this Court's existing decisions construing and enforcing the Stevens Treaties. Petitioners' basic position is that the Tribes' "right of taking fish" under the Treaties must yield in critical respects to the sale of the "vast majority" (Pet. App. 12) of tidelands in Washington State to private owners. In

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[5] Judge Beezer concurred separately to express, among other things, his concerns over the private shellfish Growers' property rights, the law of the case on the meaning of the fishing rights provision of the Stevens Treaties, and the appointment of a special master to resolve disputes under the implementation plan adopted by the lower courts. See Pet. App. 42-49.

Fishing Vessel, however, this Court held (or, more precisely, reaffirmed) that "[t]he contingency of the future ownership of the lands * * * was foreseen and provided for" (443 U.S. at 680 (quoting *United States* v. *Winans*, 198 U.S. 371, 381 (1905)) when the Treaties were signed; that the Treaties provided for that contingency in part by entitling the Tribes to "cross[]" and "occupy" private property when exercising their "right of taking fish" (*id.* at 680-681 (quoting *Winans*, 198 U.S. at 381)); that neither side to this dispute "may rely on the State's regulatory powers or on property law concepts to defeat" rights under the Treaties (*id.* at 682); and that the "equitable measure" of fish the Tribes are entitled to take under the Treaties "should initially divide the harvestable portion * * * into approximately equal treaty and nontreaty shares," subject to reduction upon a fact-specific showing that "tribal needs may be satisfied by a lesser amount" (*id.* at 685). Those holdings decide virtually every dispute in this case, except for the meaning of the shellfish proviso. And, as discussed below, the court of appeals' interpretation of that proviso is correct, and its precedential significance is confined to this case alone. Further review is therefore not warranted.

1. a. Petitioners contend (State Pet. 12-18; Growers Pet. 26-28) that the Tribes' right to take shellfish should be confined to the species that they took at the time of the Treaties and further confined to the exact places where those species were then found. Again, this is not a dispute about the geographical reach of the Tribes' "usual and accustomed grounds" for fishing in general, which have long been held to include all areas at issue, including "deep water" areas. See Pet. App. 159; see also *id.* at 19-20. Instead, petitioners contend that the Treaties give the Tribes access to those areas for purposes of taking many kinds of fish (such as salmon and herring) but not others (in particular, not certain species of shellfish).

As an initial matter, the factual premise of that claim—that the Tribes traditionally took few shellfish and never in deep water (see Wash. Pet. 21)—is very much disputed, although petitioners do not make that clear. At treaty time, the Tribes had long taken many species of shellfish, both for their own consumption and for commercial purposes. See, *e.g.*, Pet. App. 10. Moreover, the Tribes introduced substantial evidence at trial that their shellfishing activities extended to deep water areas, despite the assumption to the contrary in the State's petition. See Tribes C.A. Br. 88-92. Finally, although the State repeatedly uses the term "deep water shellfish" (see, *e.g.*, Pet. 21) as though it identified particular species (which, the State erroneously suggests, the Tribes could never have taken), many species of shellfish can and often do exist naturally in both intertidal and deep waters. See note 3, *supra*.

Even apart from those threshold factual problems, however, petitioners' species-based construction of the Stevens Treaties is without merit. The Treaties reserve the Tribes' preexisting and plenary "right of taking fish," subject only to the proviso against taking shellfish from beds "staked or cultivated" by non-Indians. Had the treaty negotiators intended to limit that general right to the species and harvest methods used at treaty time, despite inevitable changes in fish populations, they would have made that clear, and they would not have chosen the word "fish," which has "perhaps the widest sweep of any word the drafters could have chosen," Pet. App. 18, and which "fairly encompasses every form of aquatic animal life," *id.* at 57. Even if the treaty language were in any respect ambiguous, which it is not, it is hornbook law that ambiguities in Indian treaties "are to be resolved in favor of" the Indian signatories, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), a principle that this Court has repeatedly applied in

cases involving interpretation of the Stevens Treaties. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 679.

Nor can support for petitioners' approach be derived from the judicial decisions upon which they rely. Petitioners focus on this Court's observation in *Fishing Vessel* that "securing" fishing rights is "synonymous with 'reserving' rights previously exercised." 443 U.S. at 678. But, as the Court added in the next sentence, the "right previously exercised," on which this Court placed a "broad gloss" (*id.* at 679), is defined as the general right of tribal members "to meet their subsistence and commercial needs by taking fish from treaty area waters" (*ibid.*). That is precisely the right that the Tribes seek to exercise here, and nothing in *Fishing Vessel* suggests that the right should be subdivided and limited on the basis of species. See also *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 398 (1968).[6] Similarly, petitioners' position draws no support from *Seufert Brothers Co.* v.

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[6] The State also notes that, as quoted in the background section of *Fishing Vessel* (see 443 U.S. at 667), the district court had observed in *Washington I* that, under their Treaty, "the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising." 384 F. Supp. at 381. But nothing in *Washington I*, much less *Fishing Vessel*, supports the notion that Indian fishing rights could be subject to *limitations* based on species. To the contrary, in a passage of *Washington I* that petitioners fail to cite, the district court held that the Tribes' treaty right "is not limited as to species of fish, the origin of fish, the purpose or use or the time or manner of taking," and that the treaties "do not prohibit or limit any specific manner, method, or purpose of taking fish." 384 F. Supp. at 401, 402. That determination was based on the district court's finding that, historically, "Indian fishing was not limited to any species. They took whatever species were available at the particular season and location." *Id.* at 350- 352. The district court's legal conclusions in *Washington I* were affirmed in all respects in *United States* v. *Washington*, 520 F.2d 676, 693 (9th Cir. 1975), and were left undisturbed in *Fishing Vessel*.

United States, 249 U.S. 194 (1919). Cf. Wash. Pet. 18; Growers Pet. 26-28. The issue in that case was not the content of the Tribes' "right of taking fish," but the boundaries of the Tribes' "usual and accustomed" grounds for exercising that right. The two issues are distinct, and, as noted, the latter is not presented here.[7]

Finally, the State contends (Pet. 19-21) that the courts below improperly applied the apportionment or "moderate living" standard set forth in *Fishing Vessel*, and that allocation of shellfish resources must depend on the "historic

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[7] The State contends (Pet. 16-17) that the decision below conflicts with decisions holding that certain other Indian treaties pose no obstacle to prosecution of individual Indians who violate a federal criminal prohibition on the commercial sale of eagle feathers. See *United States* v. *Dion*, 752 F.2d 1261 (8th Cir. 1985) (en banc), on remand to 762 F.2d 674 (8th Cir. 1985), rev'd in part, 476 U.S. 734 (1986); *United States* v. *Top Sky*, 547 F.2d 486 (9th Cir. 1976). There is no such conflict. In those cases, the courts concluded that the Indians neither understood nor intended that their treaty right would encompass a right to sell eagles commercially, and that they in fact "deplored" the practice. *Top Sky*, 547 F.2d at 487-488; *Dion*, 752 F.2d at 1264. Here, by contrast, the historical evidence establishes that the Tribes took virtually all species of fish, including shellfish, available to them for commercial, subsistence, and other purposes, and that the Indians understood the Stevens Treaties to reserve their right to take all kinds of fish, including shellfish, at their usual and accustomed fishing areas. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 665-668. Finally, the district court decisions upon which the State relies (Pet. 15) actually support the legal conclusion that the Tribes' fishing right is not limited by species or harvest methods. See *United States* v. *Michigan*, 471 F. Supp. 192, 260 (W.D. Mich. 1979) (holding that the Indians' right to fish "is not a static right" and "is not limited as to species of fish, origin of fish, the purpose of use or the time or manner of taking"), modified, 653 F.2d 277 (6th Cir.), cert. denied, 454 U.S. 1124 (1981); *Lac Courte Oreilles Band* v. *Wisconsin*, 653 F. Supp. 1420, 1430 (W.D. Wisc. 1987) (holding that the Tribes are not confined to "fishing methods their ancestors relied upon at treaty time" and concluding that "[t]he method of exercise of the right is not static" and, therefore, the Tribes may take advantage of improvements in the fishing techniques they used at treaty time).

dependence" of the Indians on each species of shellfish. See also UPOW Pet. 27-29. Again, however, the Tribes reserved their preexisting, plenary "right of taking fish." That right naturally includes the ability to adjust their fishing practices to accommodate changes in fish populations over time.[8]

Despite petitioners' claims to the contrary (*e.g.*, Wash. Pet. 19-21), the court of appeals followed the allocation methodology set forth in *Fishing Vessel*. In that case, the Court held that "an equitable measure of the common [fishing] right should initially divide the harvestable portion * * * into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount." 443 U.S. at 685; see also *id.* at 686 n.27 ("[s]ince the days of Solomon, [a 50-50] division has been accepted as a fair apportionment of a common asset").[9] The court of appeals' determination here that tribal needs cannot be "satisfied by a lesser amount" of naturally occurring shellfish (Pet. App. 32-33 & n.11) was factbound and correct.[10] Indeed, the court's approach was, if anything,

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[8] It is beyond dispute that fish resources in the treaty areas are far below treaty time levels (see *Fishing Vessel*, 443 U.S. at 668-669), largely because of extensive non-Indian fishing and other activities. It also bears repetition that, at treaty time, the Tribes relied extensively on shellfish for commercial purposes and for their own consumption.

[9] By way of example, the Court suggested that a lesser amount might be appropriate where a tribe "dwindle[s] to just a few members" or "find[s] other sources of support that lead it to abandon its fisheries." 443 U.S. at 687.

[10] The court of appeals properly upheld the district court's determination that the Tribes "lag significantly behind other residents of the State of Washington in their overall standard of living." Pet. App. 33. That factbound issue warrants no further review. There is also no merit to UPOW's contention (Pet. 28-29) that the district court failed to consider casino revenues in its analysis. The court of appeals concluded that, even if it had considered tribal income from casino operations, it would have

less generous to the Tribes than they might have hoped, since the court excluded the Tribes both from any share of the harvest covered by the shellfish proviso (see *infra*), *and* from any share of the portion of shellfish on *natural* beds whose existence is attributable to the efforts of non-Indians. See *id.* at 33-34.

b. The private landowner petitioners contend (Alexander Pet. 12-19; UPOW Pet. 14-19) that, because the Treaties grant the Tribes the right of taking fish "in common with" all citizens, they do not authorize the Tribes "to harvest shellfish on private tidelands from which the general public is lawfully excluded" (Alexander Pet. 19). That claim is also foreclosed by this Court's decisions.

In *Winans*, the Court rejected the argument that "the Indians acquired no rights but what any inhabitant of the Territory or State would have," explaining that such a result would constitute "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." 198 U.S. at 380. More than 70 years later, the State of Washington argued in *Fishing Vessel* that the Stevens Treaties guaranteed the Tribes nothing more than an "equal opportunity" to harvest fish in competition with the increasing numbers of non-Indians. See 443 U.S. at 676-677 & n.22. This Court again rejected that argument, which it considered virtually a "matter decided" by *Winans* and other decisions (*id.* at 679), and reaffirmed the Tribes' substantive right to an equal share of the harvestable fish (*id.* at 685):

> It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter "should be excluded from their ancient fisheries," and it is accordingly inconceivable that either party

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concluded that the district court's findings were not clear error. Pet. App. 33 n.11.

> deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish.

Id. at 676 (citation omitted).[11] More generally, the Court held, "[t]he contingency of the future ownership of the lands * * * was foreseen and provided for" (*id.* at 680) when the Stevens Treaties were signed; the Treaties provided for that contingency both by entitling the Tribes to take a fair share of the harvestable fish and by granting them access to private lands for that purpose. *Id.* at 680-681.[12]

Petitioners argue that those prior holdings are inapplicable because the fish at issue in those cases were anadromous fish rather than shellfish. But that distinction, to the extent that it has any significance here at all, cuts against petitioners' position. Under the line of decisions culminating in *Fishing Vessel*, the Tribes' right of access to private property indisputably "include[s] the right to use private tidelands for beach seines, tidal impoundment traps, stake nets and reef nets" (see Pet. App. 24), as well as a right "of erecting temporary buildings" for curing the fish (*Winans*, 198 U.S. at 381; see also *Seufert*, 249 U.S. at 197-199). By contrast, the decisions below sharply limit the Tribes' right of access to private property within the same "usual and

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[11] Petitioners suggest (Wash. Pet. 7; Alexander Pet. 2; UPOW Pet. 14) that only about 50% of the State's tidelands are privately owned. That is simply incorrect. The evidence at trial, much of it provided by the State's own witnesses (see, *e.g.*, S.E.R. 337- 338, 572-573; see also *id.* at 999-1002), confirms the courts below were correct in finding that the "vast majority" of tidelands are now in private hands. Pet. App. 12, 73.

[12] Petitioner UPOW suggests (Pet. 10) that the Treaties themselves bar the Tribes from entering private lands, citing a provision of one of the Treaties giving the Tribe a right "to reside upon any land * * * claimed or occupied" by non-Indians "if with the permission of the owner or claimant." But the right of the Tribes to "reside" on privately owned land is, of course, not at issue here.

accustomed" fishing grounds for purposes of taking shellfish. For example, the Tribes are generally limited to five days of shellfish harvesting per year (Pet. App. 38); they may not gain access to privately owned uplands except where they demonstrate an inability to gain access "by boat, public road, or public right of way" (*id.* at 37-38, 146); and they must comply with a variety of important notice, surveying, and time-of-day restrictions (*id.* at 125-133). The right to make such minimal incursions on private property is included within, and pales in comparison to, the much broader rights of access repeatedly affirmed by this Court.

Petitioners also seek to distinguish shellfish from other kinds of fish on the theory that the common law deemed shellfish to be part of the property on which they are located. That argument is both incorrect on its own terms and irrelevant. First, under the overwhelming weight of precedent at the time of the Treaties, natural shellfish beds were part of the common fishery and were therefore subject to harvesting by the public. See Pet. App. 25, 61-64; see also *Smith* v. *Maryland*, 59 U.S. (18 How.) 71, 74-75 (1855); *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 413-414 (1842). Moreover, whatever the status of the common law then or now, this Court has repeatedly held that non-Indians may not rely on "property law concepts" to defeat the Tribes' right of taking fish under these federal treaties. See, *e.g.*, *Fishing Vessel*, 443 U.S. at 682. For that reason, UPOW's reliance (Pet. 19-21) on several early 20th century Washington Supreme Court decisions regarding state law property issues is misplaced. Indeed, those decisions do not address the federal rights guaranteed by the Stevens Treaties.

Petitioners' reliance (*e.g.*, UPOW Pet. 14-15) on *Antoine* v. *Washington*, 420 U.S. 194 (1975), and *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753 (1985), is equally without merit. In *Antoine*, this Court did not even address whether the Indians were entitled to hunt on

private land under the agreement at issue there, because that issue was not presented by the case. 420 U.S. at 207-208 n.11. In *Klamath*, the treaty language at issue, unlike the language of the Stevens Treaties, confirmed that the tribal usufructuary rights in question were meant to exist only "within the limits of the reservation." 473 U.S. at 766; see *id.* at 766-768. Nothing in that decision calls into doubt this Court's seven decades of consistent interpretation of the Stevens Treaties. For similar reasons, there is no merit to petitioners' reliance (*e.g.*, Alexander Pet. 14-15) on various lower court decisions involving other Tribes with different usufructuary rights under different treaty language. See, *e.g.*, *Lac Court Oreilles Band* v. *Wisconsin*, 760 F.2d 177, 182 (7th Cir. 1985); *Mille Lacs Band of Chippewa Indians* v. *Minnesota*, 952 F. Supp. 1362, 1378 (D. Minn.), aff'd, 124 F.3d 904, 933-934 (8th Cir. 1997), cert. granted, No. 97-1337 (June 8, 1998) (argued Dec. 2, 1998). Indeed, in *Mille Lacs* the Tribes at issue did not seek access to private lands that were not open to members of the public, and in *Lac Court* the Tribes similarly did not assert rights of access to private lands as a general matter.

Relying on *Winans* and *Seufert*, petitioners separately contend (UPOW Pet. 16-17; Alexander Pet. 15-18) that the Tribes should be required to demonstrate historic use of a given trail before following it over private lands. Neither *Winans* nor *Seufert* supports that argument. The degree or type of evidence necessary to establish a right of access was not at issue in either case. Rather, both cases stand for the settled proposition that Indians have a right of access over private property to effectuate their treaty fishing rights. Although there had been open and notorious use of the private land at issue in *Winans* and *Seufert*, the Court in each case noted that fact only in passing and did not treat it as a necessary basis for its holding. See *Seufert*, 249 U.S. at 197-199; *Winans*, 198 U.S. at 381-384. To the contrary,

Winans broadly states that the Treaties "fix[] in the land such easements as enables the [fishing] right to be exercised." *Id.* at 384. Moreover, in *Fishing Vessel*, the Court reaffirmed that the Tribes' right "to cross private lands" was a right that "non-Indians do not have," 443 U.S. at 676 n.22, a characterization that forecloses petitioners' suggestion that the right is confined to easements acquired under ordinary common-law principles through open and notorious use over time. Indeed, the dissent in *Fishing Vessel* recognized that the right is "a 'servitude' upon all non-Indian land" (*id.* at 701 (Powell, J.)), which "entitle[s] the Indians to trespass on any land when necessary to reach their traditional fishing areas" (*id.* at 703 (Powell, J.)).

Finally, the Tribes' right of access to privately owned uplands is substantially limited by the requirement, which the court of appeals affirmed (Pet. App. 37-38), that the Tribes first "demonstrate the absence of access by boat, public road, or public right of way" (*id.* at 37). Thus, the extent to which exercise of these treaty rights will actually result in the Tribes' access to private uplands is circumscribed and uncertain at this time.

c. Petitioners further contend (Wash. Pet. 22-27; Growers Pet. 20-28; Alexander Pet. 20-23) that construing the Treaties to permit the Tribes to take shellfish in their "usual and accustomed" fishing grounds would violate the "equal footing" doctrine. That argument is also foreclosed by this Court's precedents.

Under the equal footing doctrine, the federal government is presumed to have held tidal and submerged lands under navigable waters in trust for future States, such that, upon achieving statehood, each State assumes sovereign title to those lands on an "equal footing" with the established states. See *Montana* v. *United States*, 450 U.S. 544, 551 (1981); see also *Shively* v. *Bowlby*, 152 U.S. 1 (1894). The court of appeals found (Pet. App. 20-23) that the doctrine is inappli-

cable here because the fishing rights at issue are aboriginal rights reserved by the Tribes rather than federal rights once held and then conveyed by the United States, and because application of the doctrine has focused on actual ownership of lands, and ownership is not at issue here. Petitioners take issue with each of those rationales, but the short answer to their "equal footing" claim is that this Court has already squarely rejected it, as the court of appeals also explained (*id.* at 22).

As discussed above, this Court held in *Winans*, as it would reaffirm in *Fishing Vessel* decades later, that the Treaties entitle the Tribes to "cross[]," "occupy," and indeed "erect[] temporary buildings" on private land for the purpose of exercising their traditional fishing rights, and that the Treaties "impose[] a servitude upon every piece of land," public or private, for the exercise of those rights. 198 U.S. at 381. The Court specifically repudiated a challenge based on the equal footing doctrine, explaining that "surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.'" *Id.* at 384. There can thus be no challenge here to the "servitudes" the Tribes enjoy on private land in their "usual and accustomed" fishing places. And it makes little sense to suggest that the equal footing doctrine draws distinctions among the kinds of fish the Tribes may harvest in those same places.[13]

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[13] Petitioners seek to escape the precedential significance of *Winans* by suggesting (*e.g.* Wash. Pet. 25) that, under the shellfish proviso, the Tribes' right to take shellfish is more temporary than their right to take other kinds of fish. That argument, however, depends on a challenge to the case-specific determination by both courts below (Pet. App. 27-28, 69-73) that the proviso was written to secure continued protection for the Tribes' traditional right to take shellfish from natural beds. See *infra*. That determination distinguishes this case from *Crow Tribe* v. *Repsis*, 73 F.3d 982 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996), in which the

2. The only significant issue in this case that is not controlled by existing legal precedent is the meaning of the shellfish proviso, which bars the Tribes from taking shellfish from "any beds staked or cultivated by citizens." The court of appeals' interpretation of that proviso was correct, and the precedential significance of that interpretation is limited to this case, because no similar language appears in any other treaty of which we are aware. Further review is therefore not warranted.

a. After conducting an exhaustive evaluation of the proviso's drafting history and purpose (Pet. App. 58-78), the district court interpreted the proviso to exclude the Tribes from artificial shellfish beds but not from natural beds. *Id.* at 77- 78. The court found, among other things, that natural shellfish beds at treaty time were reserved by law for public use (*id.* at 61-64), that they "were almost never 'staked' or 'cultivated'" (*id.* at 65), that the treaty negotiators were familiar with industry practices in both the East Coast and in Washington Territory (*id.* at 65-66), and that they understood "natural" beds and "staked or cultivated" beds to be mutually exclusive categories (*id.* at 77-78). See also pp. 3-4, *supra* (describing historical practice of "staking" and "cultivating"). The court of appeals upheld that conclusion, reasoning that the district court's extensive analysis was "correct" (*id.* at 26); that a construction of the proviso excluding the Tribes from natural shellfish beds on private property would "effectively eliminate the Tribes' right to take shellfish under the Treaties" (*id.* at 27); that such a construction would thus "provid[e] 'an impotent outcome to

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treaty right at issue *was* designed to be temporary. See also *Ward* v. *Race Horse*, 163 U.S. 504, 515 (1896) (addressing "temporary and precarious" rights). Indeed, the *Repsis* court itself cited that factor as its basis for distinguishing the rights at issue in that case from the fishing rights reserved in the Stevens Treaties. See 73 F.3d at 991.

negotiations and a convention which seemed to promise more, and to give the word of the nation for more'" (*id.* at 27-28 (quoting *Winans*, 198 U.S. at 380)); and that it would "cast[] aside black-letter canons" of treaty interpretation (*id.* at 28).

The Growers (Pet. 18-19) and private landowners (see, *e.g.*, Alexander Pet. 23-26) argue that the court of appeals construed the phrase "any beds staked or cultivated" too narrowly. The relevant question, however, is what the treaty parties intended by the language they borrowed from shellfish industry usage at the time of the Treaties. The evidence introduced at trial concerning that language's meaning within the industry was not, as petitioners repeatedly suggest, confined only to the "intricacies of east coast state law" (Growers Pet. 19; see also Wash. Pet. 28; Alexander Pet. 25), but also included west coast practices as well, industry treatises, articles in the popular press, and the writings of the treaty negotiators themselves. Pet. App. 60-71. In addition, the lower courts considered the post-treaty conduct of the parties and correctly concluded that nothing in the post-treaty materials proffered by petitioners outweighs the "compelling evidence" (*id.* at 59) that the negotiators intended to exclude only artificial shellfish beds from the Tribes' shellfishing rights (*id.* at 74-75).[14]

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[14] UPOW claims (Pet. 22) that its interpretation of the shellfish proviso draws support from a letter written in 1905 by the Commissioner of Indian Affairs, who opined that lessees of tidelands containing natural clam beds could exclude treaty Indians from them. Pet. App. 211-213. As the district court correctly observed, the letter "has no relevance to the appropriate interpretation of the Shellfish Proviso," because the Commissioner based his determination *not* on the language of the proviso, but on an interpretation of the "in common with all citizens" clause of the Treaties. *Id.* at 76. That interpretation was rejected in *Winans* 45 days after the letter was written. See 198 U.S. at 379-382.

b. Petitioners argue that the court of appeals created a "conflict" with other circuits by deferring to some of the district court's predicate findings on the meaning of the shellfish proviso. See Growers Pet. 11-18; Wash. Pet. 27-29; Alexander Pet. 26-27. There is no such conflict, and the matter does not warrant this Court's review.

As an initial matter, the extent to which the court of appeals "deferred" to any of the district court's findings is unclear. Although the court did state that a "deferential standard" was appropriate for "the district court's findings of historical fact and its findings regarding the intentions of the parties' negotiators," it independently held that "the district court's reasoned analysis of the Proviso *is correct*"; it "adopted [the district court's] analysis as [its] own"; and it further explained that petitioners' interpretation of the shellfish proviso violates principles of treaty construction and "is totally inconsistent with the United States' avowed intention to preserve for the Indians their ancient fisheries." Pet. App. 26, 27 (emphasis added, internal quotation marks omitted). The court thus made clear that its holding did not turn on deference to the district court's subsidiary findings. For that reason alone, this case would be an inappropriate vehicle for addressing any question about the proper standard of review for appellate courts in resolving predicate factual disputes relating to treaty interpretation.

Moreover, there is no conflict between any aspect of the opinion below and the decisions from other courts of appeals upon which petitioners rely. See, *e.g.*, Growers Pet. 13-14. In none of those cases did the appellate court address any

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UPOW is also incorrect in asserting (Pet. 22) that the United States excludes treaty Indians from federal beaches (which in any event are not at issue in this lawsuit). The Tribes and the federal government have historically been able to work out arrangements for tribal shellfishing on federal tidelands. See, *e.g.*, S.E.R. 489-493.

dispute relating to the standard of review. Indeed, the interpretive issue in those cases did not rest on any facts in dispute, and they therefore did not involve any question of appellate deference to findings of fact. Rather, the decisions stand only for the undisputed proposition, which the court of appeals in this case explicitly endorsed (Pet. App. 16), that a treaty's ultimate meaning is subject to de novo review.

Finally, petitioners are plainly mistaken if they are contending, as they sometimes appear to be (*e.g.* Wash. Pet. 27), that appellate courts may never apply deferential review to *any* predicate finding of fact made by a district court in the course of treaty interpretation. Many kinds of legal determinations—from the construction of contracts to the voluntariness of confessions—rest in part on predicate factual findings, and it is undeniably appropriate for courts of appeals to review those findings deferentially. See, *e.g.*, *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996); *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985); Fed. R. Civ. P. 52(a).[15] Here, the parties disputed a variety of factual matters relevant to the meaning of the shellfish proviso, including highly fact-specific issues concerning the practices of the mid-19th century shellfish industry and the familiarity of individual treaty negotiators with those practices and the terms used to describe them. See, *e.g.*, Pet. App. 61-66. A court of appeals commits no error in deferring to a district court's findings on such issues. Indeed, in construing the

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[15] As this Court noted in *Fishing Vessel*, "[a] treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." 443 U.S. at 675. In interpreting contracts, courts routinely treat the parties' intent as an issue of fact subject to deferential review. See, *e.g.*, *ATACS Corp.* v. *Trans World Communications, Inc.*, 155 F.3d 659, 665 (3d Cir. 1998); *Servicios Comerciales Andinos, S.A.* v. *General Elec. Del Caribe, Inc.*, 145 F.3d 463, 469 (1st Cir. 1998); *NRM Corp.* v. *Hercules, Inc.*, 758 F.2d 676, 682 (D.C. Cir. 1985); cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-288 (1982).

fishing rights clause of the Stevens Treaties, this Court in *Fishing Vessel* deferred to, and relied on, the district court's factual findings regarding the understanding of the Indians and the United States at the time of treaty negotiations. See 443 U.S. at 666-668, 674-685.

3. The Growers (Pet. 28-30) and the Alexander petitioners (Pet. 27) contend that laches defeats the Tribes' assertion of shellfishing rights. That claim is without merit. Petitioners cite no decision of any court that is inconsistent with the disposition of their laches claim below (see Pet. App. 28). To the contrary, this Court has consistently rejected the application of laches against a Tribe or the United States when either brings suit to enforce Indian or federal rights. See, *e.g.*, *Board of County Comm'rs* v. *United States*, 308 U.S. 343, 350-351 (1939) (defenses based on delay in bringing claims such as laches are inapplicable to enforce Indian rights); *United States* v. *Minnesota*, 270 U.S. 181, 196 (1926); *Cramer* v. *United States*, 261 U.S. 219, 234 (1923); *Ewert* v. *Bluejacket*, 259 U.S. 129, 138 (1922); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917). Indeed, neither the Growers nor the Alexander petitioners present any claim that laches bars the United States from bringing this suit in its sovereign capacity on behalf of the Tribes. For that reason alone, their laches claim is not properly presented, for it is entirely unclear how it would benefit petitioners if laches were applied to the Tribes' claims alone.

In any event, even if it were otherwise appropriate to consider the doctrine of laches in this context, petitioners' reliance on that doctrine would still fail on the facts of this case. The Tribes did not, as the Growers suggest (Pet. 29), "long ignore[]" their treaty rights. At treaty time, and for many years thereafter, "the Indians harvested the majority of the shellfish resource." Pet. App. 12.; see also *Fishing Vessel*, 443 U.S. at 675. As a result of increasing population

pressures as well as state laws and policies, including Washington's sale of the "vast majority" (Pet. App. 12) of its tidelands into private ownership, the Tribes were gradually displaced from the shellfish fishery, until it became necessary to institute this lawsuit. The Tribes do not seek compensation for any period of exclusion from treaty lands. Thus, any delay in the filing of this lawsuit has in fact inured to the benefit of the Growers.[16]

4. The Growers contend (Pet. 5-6, 9, 29) that the court of appeals' decision imperils their investments in their shellfish farms. That contention is immaterial to the meaning of these Treaties and in any event is highly overstated as a factual matter. First, the decision below confines the Tribes to a share only of those shellfish that exist "solely by virtue of the natural propagation of the species" (Pet. App. 34), and denies them all rights to any portion of the shellfish harvest that is attributable to the Growers' efforts (*id.* at 34-35). Similarly, the Growers are entitled to all shellfish on artificial beds, which are wholly excluded from treaty rights under the shellfish proviso. Therefore, because nearly all of the Growers' oysters and mussel beds are artificial, nearly all such beds are reserved to them.

Oysters and mussels constitute approximately 66% of the total value of shellfish commercially harvested from the Washington tidelands. See PL-988, Table 50. Thus, even if the existence of all other shellfish were attributed solely to natural, unaided propagation—an (incorrect) assumption that would obviously benefit the Growers—the maximum proportion of the shellfish value to which the tribes might be

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[16] Petitioner UPOW contends in passing (Pet. 19) that "all tribal claims were extinguished * * * because most of these Tribes were paid in full under the Indian Claims Commission for all previously uncompensated interests in lands." As the court of appeals determined (Pet. App. 29), that claim is without merit. See also Gov't C.A. Br. 80-83.

entitled from the Growers' properties is half of 34%, or 17%. Again, even that latter figure greatly overstates the impact that honoring the Tribes' treaty rights will have on the Growers, since many clams are the product of enhanced production techniques and are therefore excluded from the Tribes' treaty rights.

* * * * *

This Court granted certiorari in *Fishing Vessel*—even though there, as here, "the principal issue involved [wa]s virtually a 'matter decided' by our previous holdings" (443 U.S. at 679)—only "[b]ecause of * * * widespread defiance of the District Court's orders" and an ongoing and irreconcilable "conflict between the [Washington] state and federal courts" concerning the matters at issue (*id.* at 674). Here there is no such conflict, and there are no practical exigencies that would require this Court's intervention. On the basis of an enormous factual record, the lower courts have succeeded in bringing this case to a correct and fair resolution, under which the Tribes retain the fishing rights they were promised and non-Indians retain both a fair share of all naturally occurring shellfish and an absolute entitlement to every single shellfish whose existence is attributable to their efforts. No further review is warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1999

(6)

Supreme Court, U.S.
FILED
MAR 11 1999
OFFICE OF THE CLERK

No. 98-1052

IN THE

Supreme Court of the United States

October Term, 1998

LARRY B. AND SHIRLEE ALEXANDER, et al. and
WILLIAM AND CHARMOND ADKINS, et al.
Petitioners,

v.

UNITED STATES OF AMERICA, et al.
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PRIVATE OWNERS' REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The decision below is both sweeping and unprecedented: no court has previously given Indian tribes the right to enter upon private property to take resources from the land itself. By authorizing Indian tribes to enter upon the privately owned beaches of thousands of Washington residents to take half the naturally occurring shellfish, the Ninth Circuit decision conflicts with decisions in other circuits construing treaty language far broader than that at issue in the Stevens treaties. It also conflicts with this Court's decisions limiting tribal access to narrowly defined private lands to harvest anadromous fish that could not otherwise be taken. This Court should grant the Private Owners' petition.

REPLY TO STATEMENT OF THE CASE

The "heavily fact bound" inquiry that the Tribes claim underlies the district court's decision (Tribes' Brief at 1) is illusory. The district court itself found the historical record to be largely undisputed.[1] The parties' dispute in the district court centered not on the historical record but the inferences of "intent" that were to be drawn from those historical facts.

The respondent Tribes falsely characterize the Stevens treaties as focussed exclusively on protecting their ability to

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[1] *See* App. 66 ("the parties agree that the minutes of the treaty negotiations reflect no specific discussion of the Shellfish Proviso"); App. 70 ("Both sides characterize Stevens as a self-conscious historical actor who proceeded cautiously, guided by a vision for the future of Washington Territory"); App. 71-72 ("The parties also agree that the United States negotiators anticipated industrial and urban development in the relevant geographical area, and expected that mills, ports and eventually cities would be erected on the tidelands.").

catch fish. The United States admits that the treaties were negotiated with the intent to quiet title to the Territory and provide those Tribes who were ceding their ancestral lands with reservations and a livelihood. The Stevens treaties thus provided for the allotment of farmland to the Indians while protecting their right to continue hunting and fishing away from their reservations, particularly for anadromous salmon which served as the staple of their diet and the center of their religion and culture. App. 169, 180, 189, 195; ***Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n***, 443 U.S. 658, 665-66 (1979).[2]

Further, the respondents' contention that the Stevens treaties were intended to forever provide the Tribes access to natural shellfish beds cannot be squared with the undisputed historical record. The treaties were designed to facilitate settlement, which at treaty time meant the use and occupation of tidelands, even if they happened to contain the Tribes' historical shellfish beds.[3]

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[2] In the treaty minutes the Indians consistently spoke of the importance of catching salmon. Shellfish are hardly mentioned, nor is there any evidence in the minutes that the treaty Indians understood the practices of the shellfish industry, whether conducted on the East Coast or at Shoalwater Bay, far from the treaty area of Puget Sound (Ex. D-064)

[3] The district court found:

> [T]he Tribes appear to have conceded that some of the development along the tidelands, but not all, has extinguished their right to take fish from those particular areas.

App. 72.

The historical record thus belies the respondents' contention that the treaty negotiators envisioned preserving in perpetuity a tribal right to enter upon and harvest shellfish from all natural beds, wherever located. The individual state's authority to extinguish such rights in tidelands was well established. *See* ***Dutton v. Strong***, 66 U.S. 23, 32 (1861) ("our ancestors . . . soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil between high and low-water mark to the accomplishment of these objects."). Each state dealt with the issue of tideland ownership in the manner best suited to its particular geographic, economic and cultural needs. *See* ***Shively v. Bowlby***, 152 US 1, 26 (1894).

Washington's decision to authorize private ownership of tidelands, first for filling and dredging in the nineteenth century, and then to promote the residential development of waterfront properties in this century, was no historical anomaly. The treaty drafters' clear expectation that the future state of Washington could, by authorizing the private development of tidelands, terminate a Tribe's ability to harvest shellfish creates a paradox that the district court characterized as "perplexing" (App. 72) and that the respondents now ignore. Indeed, until this case neither the Tribes nor the United States had contested the State's undisputed authority to create in tidelands private property interests that eliminate natural shellfish beds.[4]

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[4] Contrary to the respondent Tribes' contention (Tribes' Brief at 18 n.20), the natural shellfish beds located on the Private Owners' soil run

(continued...)

REPLY ARGUMENT

A. The Court Of Appeals' Decision, An Unprecedented Extension Of Tribal Usufructuary Rights To Privately Owned Property, Conflicts With Decisions Of Other Circuits And Is Unsupported By This Court's Decisions.

The rulings below directly conflict with the decisions of the Seventh and Eighth Circuits under treaty language far more sweeping than the qualified right of taking shellfish, that was limited by the proviso in the Stevens treaties. The rulings below cannot be supported by this Court's decisions in ***United States v. Winans***, 198 U.S. 371 (1905) and ***Seufert Brothers Co. v United States***, 249 U.S. 194 (1919), where the United States disclaimed the sweeping off-reservation tribal right to enter upon thousands of privately owned parcels of land.

The respondents cannot avoid the conflict created by the Seventh and Eighth Circuits' forceful rejection of treaty rights to take resources on private lands by distinguishing these cases on the basis of "different treaty language." (Brief of United States at 23) The Seventh and Eighth Circuits held that Indian tribes were given no right to fish, hunt or gather on private lands under treaty language that reserved to them the "privilege

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[4](...continued)
with their interests in the soil itself. Unharvested natural shellfish, unlike cultivated shellfish, "in a very material sense, belong with the land." ***Sequim Bay Canning Co. v. Bugge***, 49 Wash 127, 131, 94 Pac. 922, 923 (1908). *Compare*, ***Edison Oyster Co. v. Pioneer Oyster Co.***, 22 Wn.2d 616, 157 P.2d 302, 307 (1945) ("There is no question but that the oyster seed, and the oysters resulting therefrom, constituted personal property.").

of hunting, fishing and gathering wild rice, upon the lands, rivers and lakes included in the territory ceded." Treaty with Chippewas, July 29, 1837, 7 Stat. 536. *See* ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin***, 760 F.2d 177, 182 (7th Cir. 1985); ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt***, 700 F.2d 341, 365 (7th Cir. 1983); ***Mille Lacs Band of Chippewa Indians v. Minnesota***, 124 F.3d 904, 933-34 (8th Cir. 1997), *cert. granted* __ U.S. __ (1998) (No. 97-1337).

Moreover, by holding that the Tribes have the right to enter and take shellfish from each and every parcel of privately owned tidelands in western Washington State, the decisions below mark an unprecedented departure from the limited right of access recognized by this Court's decisions in ***Winans*** and ***Seufert***. The Yakama's "famous" fishery on the shorelands adjacent to the Columbia River rapids was an "immemorial right like a ripened prescription" until it was cut off by Winans' fences and fishwheels. ***Winans***, 198 U.S. at 371, 374 (argument of the United States). The Court held in ***Winans*** that the treaty right to fish necessarily implied that the Indians "were given a right in the land -- the right of crossing it to the river -- the right to occupy it to the extent and for the purpose mentioned." 198 U.S. at 381.

But the Yakama's "right in the land" to gain access to the salmon that they were promised in their treaty cannot be equated to the right to harvest shellfish from each and every tideland parcel along Washington's coastlines. First, the United States sought not "a broad and vague servitude on all patented

lands . . . but only a clear and limited one on this particular small tract." ***Winans***, 198 U.S. at 373. As the ***Seufert*** Court held:

> [T]he "servitude" is one existing only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year that any person, not negligently or wilfully blind to the conditions of the property he was purchasing, must have known of them..

Seufert, 249 U.S. at 199.

Moreover, the ***Winans*** Court enunciated the Tribes' right of access by analyzing the nature of the resource. The fact that "shellfish are fish" adds nothing to the inquiry into the scope of tribal access to shellfish. The immobile shellfish resource at issue here differs markedly from the migratory salmon that was monopolized by the fish wheels in ***Winans*** and the non-Indian fishing in ***Fishing Vessel.*** Excluding Indians from the Private Owners' tidelands cannot deprive the Tribes of their ability to harvest shellfish from the hundreds of miles of public and tribally owned tidelands located throughout the treaty area.[5] The issues presented by the State and private petitioners do not undermine ***Winans'*** limited holdings.

Petitioners do not question the Tribes' right to take fish from public waters, or to take shellfish from those tidelands not

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[5] The United States' own evidence reflects that of 2,227 miles of tideland in Puget Sound and along the Strait of Juan de Fuca, 1,180 miles, or 53%, was in private ownership. By contrast 880 miles of tidelands was held by the State of Washington, with 113 miles located adjacent to Indian reservations and 54 miles in Federal ownership. Ex. US -181.

in private ownership free of the state regulation that applies to non-Indians. Petitioners do not purport to deny tribal access across an upland trail to a usual and accustomed fishing station, or to those beaches habitually used for reef nets and beach seines under the circumstances required by ***Winans*** and ***Seufert***. Petitioners do, however, dispute the refusal of the courts below to acknowledge the "serious questions," ***Antoine v. Washington***, 420 U.S. 194, 207-08 n.11 (1975), raised by an unprecedented interpretation of the Stevens treaties that allows the Tribes to enter upon over 150,000 parcels of private property to take resources from the land itself.

B. The Decision Below Conflicts With This Court's "Equal Footing" Precedent By Limiting The State's Ability To Establish Private Property Rights In Tidelands.

Under the decision below, Washington alone among the states is without the inherent sovereign authority to convey clear title to its tidelands, in conflict with this Court's equal footing cases from ***Pollard's Lessee v. Hagen***, 44 U.S. (3 How.) 212 (1845) through ***United States v. Alaska***, 521 U.S. 1 (1997). Respondents refuse to recognize that the tidelands at issue in this case lie at the core of the equal footing doctrine.

Petitioners have never disputed the authority of the federal government to make prestatehood reservations of interests in tidelands for legitimate sovereign purposes. But the Court must presume that Congress did not intend to do so unless that intent is "made very plain" by the statutory or treaty language. ***Utah Div. of State Lands v. United States***, 482 U.S. 193, 196-98, 201-02 (1987). The treaty right to take fish must

therefore be construed narrowly in relation to the State's tidelands, and the plain meaning of the proviso excluding Indians from staked or cultivated beds must be given effect.

Here, the courts below rejected application of the equal footing doctrine outright, reasoning that the doctrine cannot apply to prestatehood reservations of anything less than fee title. (App. 21-22) These holdings, so contrary to this Court's precedent that respondents make no attempt to defend them, are reason enough to grant the writ. Those reasons aside, however, the decisions below should be reviewed in order to confirm the right of the State of Washington to deal "with the lands under the tide waters within its borders according to its own views of justice and policy. . ." ***Shively v. Bowlby***, 152 U.S. 1, 26 (1894).

C. The Ninth Circuit Improperly Treats The Meaning Of Treaty Language As A Question of Historical Fact Reviewed For Clear Error, Rather Than A Question Of Law That Is Reviewed De Novo.

Treaty interpretation, no less than the interpretation of statutory or constitutional text, is uniquely a judicial function and not a fact-laden inquiry into the thought processes of those involved in the treaty-making process. The Ninth Circuit "reviewed [the] district court's findings of parties' intent in entering Indian treaties under the highly deferential clear error standard." (App. 16) (citations omitted) This unambiguous holding is dispositive of the United States' argument that the "extent to which the court of appeals deferred to any of the district courts findings is unclear." (United States Br. at 30)

As the Shellfish Growers demonstrate, the decision below marks a dangerous departure from established precedent requiring the appellate court to freely review ultimate issues of treaty interpretation. The "clear error" standard of review adopted by the Ninth Circuit allows treaty interpretation to turn on the paid testimony of expert historians as to what the treaty participants "intended" rather than a reasoned inquiry using established canons of interpretation.

D. The Interpretation Of The Shellfish Proviso Is A Matter Of Substantial Public Concern That Should Be Definitively Resolved By This Court.

The respondents' attempt to minimize the impact of the Court of Appeals decision ignores the enormous repercussions of the Ninth Circuit's decision to extend tribal usufructuary rights to privately owned property and its rejection of the equal footing doctrine to tribal claims of reserved easements in tidelands. Respondents' argument that the meaning of the shellfish proviso is "limited to this case" (U.S. Br. at 21; Tribes' Br. at 27) trivializes the effect of the rulings below on 150,000 property owners, most of whom were never made party to this action. The district court's implementation order condemns each owner's tidelands in a case area comprised of over 2,000 miles of beaches by establishing an unsolicited partnership with the local Indian tribe in the harvesting of any shellfish located on that owner's property. (App. 125-27) The order imposes federal court supervision, delegated to a special master, of all aspects of that unwanted partnership. (App. 128, 132-33)

Rather than a narrow ruling that has no precedential effect, the decision below will reverberate for decades as Private

Owners and Tribes litigate the disputes that will inevitably arise from this decision. That these owners have placed their faith in the federal court by complying with its decisions rather than engaging in "widespread defiance," ***Fishing Vessel***, 443 U.S. at 675, as was the case a generation ago, is all the more reason to issue the writ and reverse the decision of the Court of Appeals.

CONCLUSION

This Court should grant the Private Owners' petition and issue the writ.

RESPECTFULLY SUBMITTED this 8th day of March, 1999.

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